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**CASES**  
**DECIDED**  
**IN THE SUPREME COURT**  
**OF THE**  
**CAPE OF GOOD HOPE.**

**EDITED BY**  
**E. S. ROSCOE,** <sup>12</sup>  
**BARRISTER-AT-LAW.**

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**1885.**

# JUDGES OF THE SUPREME COURT, 1861-67.

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*Chief Justice.*

SIR WILLIAM HODGES, KT.

*Puisne Judges.*

BELL, J.

WATERMEYER, J.

CLOETE, J.

CONNOR, J.



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- PRINCIPAL AND SURETY.—*Time*.—*Promissory Note*.—See Promissory Note. 5.
- PRIVY COUNCIL.—*Appointment*.—*Interpretation of Judgment of Privy Council*.—The Court will interpret a judgment of the Privy Council according to its general intention, and will not allow any technical advantage to be taken of an ambiguous expression. *The Namaqua Mining Company vs. The Commercial Marine Insurance Company* .. .. . 47
1. PROMISSORY NOTE.—*Rate of interest*.—*Duration*.—A promissory note stipulated for interest at the rate of one per cent. per month if not paid when due: *Held*,—*Per BELL* and *WATERMEYER, JJ.*, that as the Court will interpret the note most strongly against the creditor, the rate of interest only commenced from the time the note became due, and that it continued till payment: *Held*, *Per CLOETE, J.*, that the stipulated rate of interest commenced from the making of the note and continued until judgment, and that the judicial rate of interest, viz. six per cent. per annum, was payable from the date of judgment, until payment. *A. vs. B.* 184
2. — *Forgery*.—*Liability*.—*Endorsee*.—H. and B. having obtained the signature of C. to a document fraudulently turned it into a promissory note, and passed it to D. for valuable consideration, who in his turn endorsed it to E. In an action by E. on the note against C.: *Held*,—That as he had never made the note, and the plaintiff had obtained his title through a forger, C. was not liable on the note. *Preuss and Seligmann vs. Prins* .. .. . 199
3. — *Days of Grace*.—*Orange Free State*.—*Ordinance No. 4, 1858*.—Provisional sentence was refused against the endorser of a note payable in the Orange Free State and presented before the days of grace allowed by the state had expired. But on the principal case being heard: *Held*,—That the presentment of the note was a proper one, and that the action would lie against the endorser. *Moore vs. Bosman* .. .. . 238
4. — *Alteration*.—*Right of holder*.—The payee of a promissory note for £100 fraudulently altered the amount thereof to £200,

and endorsed it over to the defendants, by whom it was endorsed to the plaintiff for the purpose of the original payee obtaining cash from them. The note not being paid at maturity, the plaintiffs brought an action for the full amount thereof: *Held*,—That they were entitled to recover the amount for which the note was originally made. *Trustees of Blackburn vs. Landsberg* .. 315

5. **PROMISSORY NOTE.—Time.—Principal debtor.—Surety.**—In an action on a promissory note to which the defendant pleaded that he was a surety and not a principal debtor, and that time was given without his knowledge to the principal debtor: *Held*, per the CHIEF JUSTICE, that the evidence showed that defendant was a surety, but that nothing had been done to damnify him as such and therefore that he was liable on the note. *Per BELL, J.*, that defendant was not a surety, and that if he were he had assented to an extension of time to the principal debtor.

*Per WATERMEYER, J.*, that even if defendant were a surety, he had acquiesced in the giving of time. That unless a maker or an acceptor of a note shows an agreement to constitute him a surety only, it is not open to him to allege that he was a surety only. *Trustees of Port Elizabeth Bank vs. Ogilvie* .. 339

1. **PROVISIONAL SENTENCE.—Judgment in the nature of.—Sale.—Right of commission and per centage for collection.**—*Swemmer vs. Behrens* .. 15
2. — **Guarantee.—Evidence.**—Provisional Sentence was refused on a guarantee in respect of which evidence was required. *Fletcher vs. Blackburn* .. 57
3. — **Failure of consideration.** *Gardner vs. Coleman* .. 60
4. — **Fraud.—Sheriff's return.**—A provisional sentence was stayed on the ground that it had been obtained on a forged document. But a sheriff's return was held to be good on its face, and it was ground for an action for damages if it was an improper return. *Haycroft vs. Filmer* .. 98
5. — **Assignment.—Consent.**—Provisional sentence was refused on a promissory note when the plaintiff had virtually assented to an assignment for the benefit of his creditors by the defendant. *Juta and Co. vs. Glynn* .. 102
6. — **Medical man.**—A medical man not appointed as provisional trustee. *In re Horak* .. 106
7. — **Assignment.—Assent.**—Provisional judgment was allowed when the executors had not given the impression that they assented to a deed of assignment in favour of creditors. *Executors of Letterstedt vs. Pilkington* .. 143
8. — **Defendant.—Insufficient description.**—It is not sufficient to designate a defendant by his initials, for the Christian name must be given in full. Provisional judgment refused in consequence. *Rawstone vs. Theron* .. 144
9. — **Promissory note.—Set-off.**—On an application for provisional judgment, defendant objected that plaintiff had agreed to give credit for certain receipts: *Held*,—That provisional judgment must be granted. *De Marillac vs. Klatsen* .. 195

10. PROVISIONAL SENTENCE.—*Bond*.—*Agency*.—*Orange Free State*.—Provisional sentence was granted for interest on a mortgage bond made and registered by defendant's agent in the Orange Free State, but execution was stayed for a time to enable defendant to plead a claim in reconvention. *Barry and others vs. Erasmus* 217
11. — *Mortgage*.—*Account current*.—See Mortgage. 3.
12. — *Notice*.—Verbal notice of a sum due under a mortgage bond is not sufficient notice on which to grant provisional sentence. *Swellendam Bank vs. Volschik* .. .. 324
13. — *Accommodation note*.—Knowledge by the plaintiff that a note is for the accommodation of a third party is not ground for refusing provisional sentence against a defendant who is *prima facie* liable thereon. *Bennett vs. Pritchard* .. .. 371
14. — *Note*.—*Agreement*.—When the holder of a note entered into an agreement to accept a settlement of his claim and then for good reasons withdrew from the agreement: *Held*,—That this was not a case for granting provisional sentence. *Alport vs. Kluver* .. .. 427
15. — *Bond*.—The Court refused to order provisional sentence against surety when the bond stipulated for two sureties and only one had been appointed. *Zwart vs. Herman* .. .. 429
  
1. RAILWAY.—*Construction of*.—*Interruption of road*.—*Interdict*.—*Compensation*.—When a railway was to cross a private road, and the company would not place gates and gate-keepers there: *Held*,—That it was not proper to grant an interdict to prevent the railway crossing the road, but that it was a case for compensation. *Executors of Pellous vs. The Wynberg Valley Railway Company* .. .. 85
2. — See Arbitration. 1.
3. — *Railways Regulation Act No 19, 1861, § 15*.—A prisoner was indicted under Act No. 19, 1861, for having wilfully and maliciously placed an iron bolt on a railway line with intent to obstruct or upset an engine. The jury found the prisoner guilty of having wilfully placed a bolt on the line, and that an engine was thereby slightly injured: *Held*, by the Supreme Court, that under the verdict the prisoner could not be convicted under § 15 of the Railways Regulation Act.  
*Per CLOETE, J.*, that the prisoner should have been indicted under § 4 of the Railways Regulation Act. *R. vs. David* .. 365
- REDUCTION OF CREDITOR'S PROOF.—See Insolvency. 22.
- REFERENCE.—See also Arbitration.—*Action for recovery of money*.—*Money expended on an estate*.—When a loan was partially expended on a landed estate it was referred to the Master to inquire if the estate had benefitted thereby, and to what extent. Such amount, if any, to be repaid by the estate and not by the borrower. *Mechan vs. Louw and De Villiers* .. .. 84
1. RESIDENT MAGISTRATE.—See Costs. 2.
2. — *Merchant Shipping Act 1854*.—*Misdemeanour*.—Although by the Merchant Shipping Act 1854, 17 & 18 Vict. c. 104, § 239,

- a master or seaman may be guilty of a misdemeanour and punishable accordingly, yet as a Resident Magistrate can only award three months' imprisonment, this is the limit of punishment in the case of offences tried before him, under 17 & 18 Vict. c. 104, § 239. *R. vs. Morgan* .. .. . 42
3. **RESIDENT MAGISTRATE.**—See Writ. 2.
4. — *Arrest.*—*Supreme Court.*—A Resident Magistrate cannot issue an arrest in the Supreme Court. *Bell vs. James* .. .. 153
5. — *Officers.*—*Seizure.*—*Creditors.*—Proceedings against a Magistrate's officer who had seized property wrongfully, dismissed, as he had acted only as a creditor's agent. *O'Flynn vs. Hendriks* .. .. . 164
6. — *Municipal Rate.*—*Act No. 31, 1860, § 64.*—The Resident Magistrate has jurisdiction to entertain an action for the recovery of municipal rates, though the person charged does not live within his jurisdiction. *Reed vs. Turner* .. .. . 220
7. — *Execution.*—*Sale.*—*Death of debtor.*—*Ordinance No. 104, 1833.*—When an execution debtor died after the seizure of his goods, under a judgment of a Resident Magistrate, and the messenger subsequently sold the goods. *Held*—on appeal from the Resident Magistrate,—that the sale of the goods under such circumstances was legal. *Van Reenen vs. Pearson* .. .. 236
8. — *Action withdrawn.*—See Civil Imprisonment.
8. — *Civil Imprisonment.*—As a Resident Magistrate cannot grant a decree of civil imprisonment out of his jurisdiction, application must be made to the Supreme Court. *Wilson vs. Taylor* .. 245
9. — *Distribution of water.*—See Water.
10. — *Jurisdiction.*—*Title to water.*—A Resident Magistrate has not jurisdiction to hear a case involving the title to water rights. *Klopper vs. Naude* .. .. . 425
11. — *Confession.*—Intent to do grievous bodily harm.—See Evidence 2.
12. — *Game Law.*—*Jurisdiction.*—See Game Law.
1. **SALE OF GOODS.**—*Consideration.*—*Conditions.*—In a sale of goods the receiving of a portion is a good consideration for the price of the whole, when the full amount purchased has not been delivered and the vendors have stipulated that they are not responsible for quantity, quality or delivery. *Crump and another vs. Williams* .. .. . 82
2. — See Resident Magistrate. 7.
3. — Purchase by thief with stolen money.—See Theft. 3.
4. — *Market regulations of Capetown, Nos. 12 & 16, Non-completion of purchase.*—A. purchased a load of oat-sheaves in Capetown market, but before removing it he found that in the inner part there were a number of wild oats, and he refused to pay for the same. The oats were not sold with a warranty as to quality: *Held*,—*Per* the CHIEF JUSTICE and CLOETE, J., *dissentiente* WATERMEYER, J.—That A. was bound to take the oats. *Semble*,—That there should have been a reference, under

R. 12, to the Market-master. <i>The Commissioners of the Municipality of Cape Town vs. Truter</i> .. .. .	412
SEDUCTION.— <i>Party entitled to bring action for proof of paternity.</i> — The general rule that the mother's oath as to the paternity of her child being sufficient when the defendant admits having had intercourse with her, will not be followed if the mother's testimony be otherwise unsatisfactory. <i>Smitsdorf vs. Horne</i> ..	32
SERVICE.— <i>Sheriff.</i> — <i>Service.</i> — <i>Apparent validity.</i> —Where the return of a writ shows on its face a good service, judgment thereon will not be set aside. <i>De Kock vs. Van Niekerk and Johnson</i> ..	1
SERVITUDE.— <i>Cattle Track.</i> — <i>Watering-place.</i> —In an action to define a servitude, it was proved that a spot marked in the diagram to a grant was not the place where cattle from a dominant tenement had been in the habit of drinking: <i>Held</i> ,—That the owner of the dominant tenement was not bound by the erroneous diagram. In regulating the width of the cattle track, it having been proved that the dominant tenement could support from 300 to 400 cattle: <i>Held</i> ,—That a track 150 yards wide was sufficient. <i>Held</i> , also, that three hours' time should be allowed for cattle to rest at the river and that cattle pasturing on the dominant tenement, but not the property of the owner, could be driven to the water. <i>Laubecher vs. Rees</i> .. .. .	408
SHARES.— <i>Arrest.</i> —Shares in certain undertakings were ordered to be arrested to prevent their alienation. <i>The South African Mortgage and Investment Company vs. McMaster</i> .. ..	197
SHERIFF.— <i>Return of.</i> —See Provisional Sentence. 4.	
1. SHIP.— <i>Latent defect.</i> — <i>Damage to cargo.</i> — <i>Merchant Shipping Act 1854, § 504.</i> —A consignee of a cargo which has been damaged owing to a latent defect in the ship, where the damage exceeds the value of the ship and freight, is entitled to such value without any deductions on account of the cost of repairs, stores, or similar expenses. <i>Dickson and Co. vs. The Executors of Blaikie and others</i> .. .. .	38
2. — <i>Collision.</i> — <i>Harbour-master.</i> — <i>Act No. 16, 1857.</i> —A vessel was moored in Simon's Bay near the B. under the orders of the harbour-master in such a position that a collision occurred. <i>Held</i> ,—That the master of the B. could recover damages against the master of the A. <i>Semble</i> ,—The master of a vessel is not bound to follow the directions of the harbour-master if he thinks that they will cause damage to be done to his ship. <i>Jones vs. Randle</i> .. .. .	64
3. — <i>Freight.</i> — <i>Lien.</i> —A charter-party stipulated that as to two-thirds of the freight it should be paid by bill at three months from the date of delivery, at the freighter's office in London, of the certificate of the right delivery of the cargo. Information, that the freighter had suspended payment, reached the master of the ship to which the charter-party related at the Cape, and he thereupon refused to deliver the cargo, retaining it as security for the balance of freight. In an action against the master of the	

- ship by the consignees of the cargo for non-delivery : *Held*,—That they were entitled to recover. *Anderson, Saxon and Co. vs. Laurenberg* .. .. . 145
4. *SHIP.—Bill of Lading.—Damage.—Injury by vermin.*—Goods in a ship were injured by water which reached them through a pipe having been gnawed by rats. The bill of lading exempted the shipowners from liability for injuries to the cargo : *Held*,—an injury by vermin, within the meaning of the bill of lading. *Poppe vs. Glendining* .. .. . 163
5. — *Charter-party.—Abandonment.—Sale by shipowner.—Right of Underwriter to proceed.*—C. and Co. chartered the G. to bring a cargo to Table Bay, and agreed to pay freight on unloading and right delivery thereof. The G. was driven ashore in Table Bay, and the defendant, the shipowner, thereupon gave notice to C. & Co. to receive and remove the cargo on the beach on payment of freight, otherwise it would be sold on account of whom it might concern. C. & Co. refused and abandoned the cargo to the plaintiffs. Defendant sold the cargo and tendered to C. & Co. the balance of the purchase-money, after deducting the freight payable. The plaintiffs brought an action to recover the entire price of the Cargo : *Held*,—That as the plaintiff made no protest after the sale, and in fact adopted it, they could not recover more than the balance tendered to them. *Per BELL, J.*, the charterers were under the circumstances bound to take delivery of the cargo. *The Cape of Good Hope Marine Insurance Co. vs. Berg* .. .. . 289
5. — *Master.—Removal.—Jurisdiction.*—The Court has jurisdiction to entertain an application to remove a master from command of a ship. *In re Spalding* .. .. . 410
- SLANDER.—Right of action.*—The defendant, an officer in the engineers, said to the plaintiff, also an officer, on the occasion of a garrison ball, "If you bring those two prostitutes into the room, you are no gentleman," alluding to two persons with the plaintiff : *Held*,—On appeal, that these words were not actionable, since they were not used *animo injuriandi*, and that to say of a person that he was not a gentleman did not thereby impute to him misconduct. *Hare vs. White* .. .. . 246
- SPECIFIC PERFORMANCE.—Variance in deed tendered by defendant after judgment for plaintiff.—Contempt of Court.*—An attachment will issue against a party to a suit neglecting to comply with an order of the Court for specific performance. *Executors of Smith vs. Galpin* .. .. . 62
- SYNOD.*—See Dutch Reformed Church. 1.
- STAMP ACT No. 3, 1864.—Prosecutor.—Costs.*—The Attorney-General being the proper person to prosecute for an offence against the Stamp Act, 1864, the Court quashed proceedings by a private individual with costs. *Stoll vs. Pocock* .. .. . 323
1. *THEFT.—Temporary use of an article.—Animus.*—When a man takes an article for a temporary purpose, and without the

- intention of depriving the owner of its permanent use, he is not guilty of theft. *R. vs. Rish and others* .. .. . 31
2. **THEFT.**—*Accessories after fact.*—A prisoner who is indicted as having committed a theft cannot be convicted as an accessory after the fact. *R. vs. Turpin and Blake* .. .. . 103
3. — *Disposal of money stolen.*—*Third parties.*—When a thief who has stolen money expends it in the purchase of articles, it cannot be recovered back from the seller unless it is clearly proved that the latter knew that it was stolen. *York vs. Van der Lingen* .. .. . 337
- TICKET.**—See Contract, breach of.
1. **TRANSFER OF LAND.**—See Injunction. 1.
2. — See Will. 7.
3. — See Vendor and Purchaser. 6.
1. **TRESPASS.**—*Interdict.*—*Action of Trespass.* *Mostert vs. Smidt* 24
2. — *Boundaries.*—*Costs.*—An action was commenced by a summons to declare boundaries; the declaration was for trespass, and the claim as to boundaries was withdrawn. The Court gave a verdict as to the trespass for a nominal amount, but ordered the plaintiff to pay all costs occasioned by the claim as to boundaries. *Rhodes vs. Coetzee* .. .. . 288
- TRUSTEE.**—*Provisional.*—*Small number of creditors.*—*Discretion of Court.*—The Court has power to appoint a provisional trustee against the wishes of the creditors of an insolvent. *In re Keighley, an Insolvent* .. .. . 26
2. — *Provisional.*—*Appointment.*—*Creditor.*—A large creditor was appointed a provisional trustee. *In re de Wet* .. .. . 61
3. — *Number.*—The Court discourages the appointment of more than one provisional trustee. *In re Eaglestein* .. .. . 104
4. — *Minors.*—*Trustee and guardian.*—*Intoxication.*—A trustee and guardian of minors will be removed by the Court from the appointment if proved to be guilty of habitual intoxication. *Nettleton vs. Kilpatrick* .. .. . 190
1. **VENDOR AND PURCHASER.**—*Agency.*—*Liability for non-fulfilment of contract.*—An estate having been purchased by A., who was unable to pay the purchase-money, B. agreed to do so for him on condition that he should receive the purchase-money when it was resold. B. resold the estate to C., who gave three promissory notes for the purchase-money. A. subsequently became bankrupt before transfer of the estate was given to C. The estate consequently fell to A.'s trustee. C. had notice of the critical state of A.'s affairs, and might have obtained transfer of the estate. In an action by C. against B. for the return of the money paid in respect of the notes: *Held*,—That under the circumstances C. could not receive the money back. *Venter vs. Green and another* .. .. . 43
2. — *Sale.*—*Non-fulfilment of conditions.*—*Re-sale.*—A purchaser failed to pay in due time the full amount of the

purchase-money, and the vendor consequently resold the estate for a higher price: *Held*,—That he was not justified in so doing, and must repay the balance of the purchase-money to the original purchaser's trustee. *Trustee of Armstrong vs. Trustees of Montgomery* .. .. . 81

3. **VENDOR AND PURCHASER.**—*Surveyor.*—*Plans.*—*Transfer.*—A surveyor having been ordered by a purchaser, to make a survey and prepare diagrams for the transfer of a property, did not include therein a portion of adjoining land not belonging to the same seller. In an action for money payable: *Held*,—That he was entitled to recover, for it was his duty not to include any but the seller's property. *De Smidt vs. Siebrits* .. .. . 88
4. — See Municipality. 5.
5. — Uncertificated Insolvent. See Insolvency. 18.
6. — *Transfer.*—*Delay.*—*Costs.*—Transfer was ordered to be given to a plaintiff who had failed to ask for transfer for fourteen years, but without costs. *Barnard vs. Le Roux* .. .. . 282
7. — *Plan.*—When a description of an estate sold is clear and the plan is wrong, the sale will be governed by this description, and not by the plan. *Visser vs. Du Toit* .. .. . 415

**WALL.** See Estoppel.

1. **WATER.**—*Distribution of.*—*Ordinance No. 5, 1848, § 2.*—The Resident Magistrate, by Ordinance No. 5, 1848, § 2, has power to enforce the distribution of water under the resolutions of the Governor and Court of Policy of January 30, 1805, Nos. 8 and 9. *Cloete vs. Heroldt* .. .. . 325
2. —*Right to.*—*Resident Magistrate.*—*Jurisdiction.*—See Resident Magistrate. 10.
3. — See Landlord and Tenant.
1. **WILL.**—*Construction.*—“*All household furniture.*”—*All other moveable property.*—*Evidence of extrinsic circumstances.*—The Court will admit evidence in order to elucidate the meaning of words used in a will, and the general rule of construction may be varied by such evidence. *Collings vs. Executors of Hartog* .. .. . 29
2. — *Ante-nuptial contract.*—*Will of married woman.*—*Costs.*—A married woman made a will and the executors claimed an account from her husband, who set up an ante-nuptial contract. The Court pronounced for the validity of the contract, but without costs. *Executors of Wicht vs. Wicht* .. .. . 54
3. — *Memorandum.*—*Revocation of ante-nuptial contract.*—*Act No. 15, 1845.*—An unsigned note was held not to affect the validity of a signed will, and letters of administration were issued. *In the Goods of Van Rooyen.* .. .. . 59
4. — *Attestation.*—*Ordinance No. 14, 1845.*—A will having been signed by the testator when the witnesses were in another room with the door between ajar: *Held*, an invalid attestation. *Lauson vs. Pritchard and Lauson* .. .. . 93
5. — *Letters of Administration.*—*Stamp Act No. 12, 1863.*—As a will only comes into use after the death of the testator, the



- Stamp Act in force at the time when it is lodged with the Master applies to it, and not an Act in force at the time of its execution. *In the Goods of Boyes* .. .. . 95
6. WILL.—*Witnesses.*—*Ordinance No. 15, 1845.*—By Ordinance No. 15, 1845, when a testator signs by means of a mark, the two witnesses required by that Ordinance must be present, but a third in accordance with the Roman-Dutch law is not required. *Troost vs. Ross* .. .. . 96
7. — *Condition.*—*Forfeiture.*—*Transfer.*—Transfer of land left by will was ordered after possession, under a bequest, had in fact been taken by the devisee, although he desired to renounce at the time of action. *Theunissen vs. Theunissen* .. .. . 107
8. — *Children.*—The word “children” when used in a will means children of the first degree only, and not grand-children. *Spengler vs. Executors of Higgs* .. .. . 221
9. — *Legitimate.*—*Filial share.*—*Interest.*—A. and B. his wife were married in community of property and made an ordinary mutual will. Subsequently they added a codicil whereby among other things the survivor was to remain in possession of the property till his or her death. Any child opposing the disposition was to receive only his or her pure legitimate portion at once. C. a son of A. and B. married D., and in 1850 B. died. In 1851 A. promised to any child who should not claim his portion at once to leave him a sum equal to the interest in his legitimate, and in 1852 made a new disposition of his share of the joint estate for this purpose. C. predeceased his father, and the latter afterwards revoked the provision as to the interest in the legitimate. On A.’s death D. claimed from his executors a sum equal to the promised interest: *Held.*—That D. had no right to claim it. *Marais vs. Leibrant and others* .. .. . 231
10. — *Children’s portion.*—*Valuation.*—When by a mutual will the survivor is left sole universal heir to pay to the children when they become of age or marry, such amount as he or she shall, according to conscience find to be due: *Held.*—That each child was entitled to something over and above its legitimate. *Oosthuizen and others vs. Moeke* .. .. . 330
11. — *Condition.*—*Right of trustees.*—See Insolvency. 29.
12. — *Outlying settlement.*—A will witnessed in accordance with English law in King William’s Town before the issue of the British-Kaffrarian letters patent was held entitled to letters of administration. *In the Goods of Robinson* .. .. . 411
13. — *Proclamation of August 22nd, 1822.*—*Domicile.*—A testator having real property in the Colony, left it by will to a person with whom he cohabited. At the time of his death, in 1864, the testator was in England. He came to the Colony in 1846; in 1852 he left it and went to England for a short time, having disposed of his property at the Cape; he returned in 1853, left again in 1854, and went through the ceremony of marriage with M. at Melbourne (he being already married) in 1855. He returned in 1857 to begin business in Port Elizabeth

- and in 1863 made his will and returned to England : *Held*,—That the testator could leave his property as he had done, the case being governed by the Proclamation of 1822. *West and another vs. Carpenter* .. .. . 434
1. WITNESS.—See Costs. 3.
  2. — See Wills. 5, 6.
  3. — *Examination of.*—*Non-commencement of action.*—On an application to examine a witness before a summons had been issued : *Held*,—That it must be refused, although the party applying was willing to issue a summons for perpetual silence on which the examination might take place. *Maynard vs. the Wynberg Valley Railway Company* .. .. . 302
  4. WITNESS.—*Taxation.*—*Allowance.*—*Engineers.*—*Builders.*—On a review of the Master's taxation of costs, an allowance of £1 11s. 6d. per day each was given to civil engineers, and 15s. each to master builders. *Tuppen and another vs. Inglesby* .. 350
- WRECK.—*Removal.*—*Ordinance No. 1, 1847.*—There is no power under Ordinance No. 1, 1847, to compel a person to whom a wreck in Algoa Bay belongs to remove it. *Skead vs. Bawden* 434
1. WRIT OF EXECUTION.—*Directors.*—A writ of execution was issued against directors personally. *Wood and Co. vs. The Lower Albany Flock-master's Association* .. .. . 91
  2. — *Resident Magistrate Act No. 20, 1836, § 12.*—A Resident Magistrate has no jurisdiction to refuse to issue a writ upon a valid judgment not appealed against. *Matthew and Green vs. M'Sevenry* .. .. . 99
- WYNBERG VALLEY RAILWAY CO.—See Arbitration.



## PREFACE.

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It may be as well to explain how the following decisions came to be published so long after they were given. A collection of the cases decided in the Supreme Court of the Cape of Good Hope during the years when no reports of the decisions of this Court were published was made by the late Mr. Justice Jacobs. As it was considered desirable that they should be open for reference to any practitioner or other person who desired to consult them, they were placed in the hands of Mr. J. C. Juta for publication, who in his turn handed them to me, to select such as I thought proper to be published, and to place them in the form which is usual in the case of the regular law reports.

In selecting cases for publication I have leaned rather towards including than excluding those as to the value of which there was any doubt, and I have discarded those only which did not seem to lay down rules or to form examples of the working of legal principles or practice, or to throw light on important Colonial matters. On the other hand, I have endeavoured to put the cases in as concise and clear a form as possible, and to eradicate all verbiage from the reports.

E. S. ROSCOE.

1, King's Bench Walk, Temple,  
*August, 1884.*



# CASES

DECIDED

## IN THE SUPREME COURT.

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DE KOCK *vs.* VAN NIEKERT AND JOHNSON.

*Sheriff.—Service.—Apparent Validity.*

*When the return of a writ shows on its face a good service, judgment thereon will not be set aside.*

Motion for a rule *nisi* on behalf of Johnson, one of the defendants, to set aside a judgment obtained by the plaintiff on the ground that the service was bad. The return of the Sheriff stated that the summons had been served on Johnson's servant, but Johnson filed affidavits showing that his servant had not been served, and that the person served was not his servant.

1861.  
Sept. 12.  
De Kock *vs.*  
Van Niekert &  
Johnson.

*Watermeyer*, for the motion.

THE COURT refused to grant a rule, on the ground that on its face the return showed a good service, and that Johnson's remedy, if he had suffered damage, was against the Sheriff.

PART I.

B

## HORAK vs. HORAK.

*Nullity of Marriage.—Fraud of Wife.—Unchastity of Wife.*

*A marriage was declared invalid on the ground that the wife had deceived her husband by not stating she was enceinte at the time of her marriage.*

1861.  
Nov. 23.  
—  
Horak vs.  
Horak.

Action for a declaration that a marriage, which had taken place between the plaintiff and the defendant, was null and void. The facts sufficiently appear from the judgment of the Court.

BELL, J.:—The plaintiff in this action, J. M. Horak, was married to the defendant, Mary Stewart, on the 12th of May, 1859. They lived happily till November 16th, when the defendant was delivered of a child. The evidence established the fact that this child was conceived two or three months before the marriage between the plaintiff and the defendant took place. It was argued by the defendant's counsel that there was no evidence that the plaintiff was not the father, if the evidence of the husband was put aside, and he contended that this evidence was inadmissible, except in cases where the child was born within six months after marriage. We consider, however, that the evidence is admissible, and that it is sufficient to rebut the presumption that *filius est quem nuptiæ demonstrant*. We are of opinion, also, that the wife must be taken to have known of her condition, and that she was aware that by the marriage she would impose on her husband a spurious progeny. We consider, also, that the case must be viewed as if the husband had raised the question of the validity of the marriage before the child was born, because as soon as he discovered the fraud practised on him, he at once and entirely renounced intercourse with his wife. In fact, the object of the marriage has been frustrated; and as there was no condonation of the fraud by the husband, we pronounce the marriage invalid, and this offspring of the wife consequently illegitimate.

BLATCHFORD *vs.* BLATCHFORD AND OTHERS.

*English marriage.—Parties subsequently domiciled at the Cape.  
—Rights of wife in husband's property.—Will.*

*The rights of a wife to her husband's estate, where no ante-nuptial contract exists, depend upon the law of marriage in the country where the parties were domiciled at the date of the marriage, and cannot be enlarged by the fact that the parties subsequently became domiciled in a country where the law grants to a surviving widow a larger share in her husband's property.*

Action brought by Mary Ann Blatchford against the executors of her late husband, George Blatchford, for a declaration that the property of which her husband died possessed was a joint estate, and that she was entitled by law to one half of it.

1861.  
Nov. 11.  
Dec. 12.  
—  
Blatchford *vs.*  
Blatchford and  
others.

The facts were as follows: In 1844 the plaintiff was married to George Blatchford at Bristol, in England. Three years later they left England and came to the Cape, being then in very poor circumstances, and not possessing more than £5 worth of property between them. They settled in this colony, and became domiciled here, having no intention of returning to their native country. Both husband and wife worked for their living, the former at his trade as a miller, the latter keeping a retail shop, first in Cape Town, and afterwards at Stellenbosch. There were no children born to them. In March, 1861, the husband died, and left a will bequeathing the whole of his property, to the value of about £3000 in movable and £3000 in immovable property, to an illegitimate son born to him before he had left England. To his widow he bequeathed an annuity of £100 per annum, the proceeds of £1500, part of the moneys bequeathed to his son, with a power to her to dispose of this £1500 by will. The plaintiff claimed that by the Colonial law she was entitled to one-half of all her husband's property, and instituted this action in order to enforce that claim.



1861.  
Nov. 11.  
Dec. 12.  
  
Blatchford vs.  
Blatchford and  
others.

*The Attorney-General*, for the plaintiff:—The facts in this case are admitted, and there is no dispute as to the marriage of the parties, or as to their having acquired all their property, disposed of by the will of George Blatchford subsequently to their arrival in this Colony. The importance of the case lay in the fact that it involved the legal relations of all married persons who came to this colony and acquired property here. He contended that the parties must be treated as though they had been married at the Cape on the day when they landed. He conceded that the law of the husband's domicile must be looked to for the validity of a marriage; the *lex loci contractus* no doubt determined the validity of this contract as of others. Further, any ante-nuptial agreement made by the parties would be absolutely binding, wherever they went. In this case the marriage was English, without any prior settlement. The principle was well established that immovables follow the law of the place where they are situated, and movables the law of the owner's domicile.

Mr. Justice Story's opinion was, that when there was a change of domicile, the movable property would follow, and be affected by that change. *Hüber*, too, was an authority for the proposition that where there was a change of domicile, movable property would take the character of the new, and not of the old, domicile. The other side would be bound to maintain that whenever a marriage was entered into, there was a tacit contract between the parties that all the legal consequences of marriage, according to the law of the country where it was celebrated, should be binding upon them. *Burge*, *Story*, and various authorities have laid down that where there was an English marriage and subsequent change of domicile, while property acquired and held in England retained the character impressed upon it by English law, after-acquired property obtained in the new domicile took the character given to it by the law of the domicile. There was a difference between the *communio bonorum* which prevailed at the Cape and in Holland, and the *communio acquestuum*, which was the rule in Friesland and Louisiana. In the former case the law merged the parties in one, and they enjoyed all things in common, and

being able to have separate estates; but in the latter, the parties to a marriage each retained his or her separate estate, and to each of these was added one-half of all property subsequently acquired. It was this latter rule, of community of acquests, which the Court should apply to the present case. The proclamation of 1822 could not deprive the plaintiff of rights which belonged to her by the general principles of jurisprudence. That proclamation was made for a special purpose, and gave English settlers the same power of disposing of their property as they would have had in England; but it did not define what was the "property" which might thus be disposed of; whereas it expressly provided that if Englishmen married in the Colony, their estates should be administered and divided on their death according to the Colonial law. While admitting that local law would override general law, this could only be so when the local law was clear, intelligible, and express; and the proclamation in question possessed none of these qualities.

1881.  
Nov. 11.  
Dec. 12.

Blatchford vs.  
Blatchford and  
others.

*Watermeyer*, for the defendants:—The proclamation of 1822 is no doubt an unintelligible document; but it clearly declared that persons married in England should retain the same rights with regard to their property as if they had not left that country. How could they have these rights, if by the Colonial law one-half of their property was to be taken from the control of the husband and given over to the wife? Mr. Justice Cloete, in the case of *Clarence v. Clarence*, clearly supported his view of the proclamation. The argument of the Attorney-General was that the community of goods must have been created on the arrival of the parties at the Cape. But persons marrying in the Colony could, by ante-nuptial contract, get rid of the community of goods altogether; whereas the Attorney-General would force a community of after-acquired property—a very different thing—upon all persons landing in the Colony. This *communio acquistum* was entirely unknown at the Cape, and was equally unknown in England. *Voet*, and a majority of eminent Dutch writers, held the view that the law of the matrimonial domicile followed the parties wherever they went. Persons marrying in one country took all the consequences of the laws of that country with regard to the

1861.  
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incidents of marriage; and this tacit agreement to be bound by the law of the place where the ceremony was performed was to be looked upon as final. The peculiar law of acquests as enacted by the State of Louisiana, had nothing to do with the present case, and the passages cited from *Hüber* and *Story* were at least of doubtful meaning.

*The Attorney-General*, in reply.

*Cur. adv. vult.*

1861.  
Dec. 12.

BELL, J., briefly stated the facts as above reported, and then proceeded:—"The present question is one of great importance, as its decision will affect the position of all married persons coming from England and Ireland to this colony. By the law of England, marriage is an absolute gift of all the wife's personal estate to the husband, and also of her choses in action conditional upon his reducing them into possession during the coverture. In her real estate he has a freehold interest for their joint lives, with the right of an estate by the courtesy should he survive her, and there be issue of the marriage. Conversely, she has a right to her dower of one-third of his real estate if she survive him, and the dower be not barred. Further, the law of England declares that the wife's liability for her debts contracted before marriage is transferred wholly to her husband<sup>(a)</sup>; and, by the same law, the husband can by will dispose, not only of his own property, but of all his wife's personal estate as well. The law of this colony differs from English law in these points. If there is no marriage contract, everything is held in common by the parties, whether acquired before or after marriage. The common estate is equally liable for the debts of both husband and wife contracted before marriage (so long as the marriage tie subsists), and for the husband's debts contracted during the marriage; while the wife's half is liable for her debts incurred by herself during its continuance. Again, by the colonial law the wife can devise by will her half of the property, common under the marriage, without reference to her husband's consent.

The question in the present case is whether the husband re-

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(a) See now Married Women's Property Acts, 1870, 1875, 1882.

tained his English right to dispose of his property, or whether these rights ceased on his arrival here, and his testamentary power became subject to the law of the Colony. Reference has been made, in the course of the arguments, to the divisions of law into real, personal, and mixed, according to the objects towards which it is specially directed. Definitions of them are given by *Merlin*, *D'Aguesseau*, and *Voet*, the latter of whom (Vol. I. Cap. 4. § 4, 5) says that according to principle none of these laws should have force beyond the territory in which they were enacted. This, he says, is generally admitted with regard to real laws, but with regard to personal laws the opinion of many is that these have force upon the persons to whom they apply, whatever be the country to which such persons may remove. The law of England completely merges the wife in her husband, herself as well as her property, while allowing her before marriage to contract for the retention of her property during the marriage in any way she may please; and this law seems to me to be rightly classed as a personal law. Thus then, according to the maxim of the civilians, that personal laws follow the parties, the law of England is to be held as having followed the plaintiff and her husband into this Colony, and as having continued to him the same right to all property acquired by him in the Colony during the marriage, which he would have had if the parties had resided in England, and had acquired the property in that country. But the authority of *Voet* (xxiii. 2, 87) goes further, and lays it down that a change of domicile cannot of itself alone make any alteration in the conditions under which parties have agreed to marry, whether there be conditions expressly arranged between the persons themselves, or be those imposed upon them by the law of their matrimonial domicile. If, for instance, universal community of goods has once been either introduced or excluded, such introduction or exclusion of it holds good in spite of a removal or change of domicile. Were it otherwise, the husband, by the mere act of removal, would have it in his power to change a marriage agreement without the consent of his wife, and against her will. "Change of contracts," says *Voet*, "may be effected by an express agreement of the parties to use the law of their new

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domicile, if the law of such domicile does not hinder gifts between spouses." The law of Louisiana expressly makes persons domiciled there subject to its own rules as to after-acquired property; and this, which is also *Story's* opinion, was urged upon us as the rule which should guide our decision in the present case, supported as it is by *Voet* (xxiii. 4, 28), where he says that if the community of goods is expressly excluded by the marriage contract, and no mention made of community of acquests, that community of property acquired during the continuance of the marriage is tacitly reserved; the argument being that the law of England stands in the place of the express contract excluding the community of goods. In my opinion the better doctrine, as it is the doctrine of the major part of foreign jurists, is that the law of domicile at the time of marriage should regulate the property rights of the spouses, into whatever new domicile they may have removed, in regard both to property acquired in that domicile and to such property as may be acquired after a change from that domicile. This doctrine seems to me most consistent with reason and sound principle, for it must be obvious that when a man and woman, living in a country whose laws define their rights after marriage, form that connexion without any express contract modifying the law, and without any intention of removing from that country, they must be taken to have approved of the mode in which that law regulated their rights. To hold otherwise would be to hold that the rights of the wife could be made as fluctuating and variable as might be the husband's caprice in regard to the place of his abode, in one country or another, although the new country and its laws may have been wholly unknown to the wife prior to the marriage. In the present case, it is true, the change of domicile would have acted beneficially to the wife. But this is merely an accident, for the opposite effect would have resulted in a country where the law was more prejudicial to the rights of the wife than in England. Before the proclamation of 1822 the rights of persons married in other countries were, by the law of this Colony, regulated by the law of the country where they were married; and I do not find that that proclamation effected any change in this

particular. That being the general law, the object of the proclamation, which lays down that all natural-born subjects of Great Britain and Ireland, whether male or female, married or unmarried, shall, if they remove to this Colony, "enjoy the same rights of devising their property, both real and personal, as they would be entitled to exercise under the laws and customs of England," was to save the estates of natural-born subjects from the claims of their children, should they have any, to their natural portion, to which, by the law of the Colony previous to the proclamation, they would otherwise have been entitled; while the rights of husband and wife *stanti matrimonio*, or after the decease of either of them were left to the protection already afforded by the common law of the Colony. I have not thought it necessary to notice the wife's right to dower, because in the present instance the husband has given to her by will more than she would, by the law of England, be entitled to in the shape of dower.

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others.

Our judgment must therefore be for the defendants.

WATERMEYER, J., after recapitulating the facts, and stating the claim made by the plaintiff, said:—"The law of this colony, except where modified by ante-nuptial contract, is a universal community of goods, whether possessed before or acquired after marriage by either of the parties. The plaintiff's contention was for a qualified community—the *communio acquestuum*—by virtue of which after-acquired property would enter into community. It is not pertinent to our decision to inquire into the merits of the Dutch law, on the one hand, or of the English law; until some uniform principle is adopted by civilized countries, it is hopeless to look for uniformity of decisions. Nor do I think it necessary to inquire whether the law that regulates the rights of parties about to be or already married, as regards property, is a personal or a real law. Voet (xxiii. 2, 87), who holds it to be 'real' law, is clearly of opinion that change of domicile cannot dissolve or alter the contract already existing; nor can it effect a change in the rights resulting from the contract to abide by the laws of the matrimonial

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others.*

domicile. The great body of civil lawyers agree with *Voet* in upholding the ubiquity of the matrimonial domicile, by force of the tacit contract which is everywhere of legal obligation. Mr. Justice Story, indeed, thinks this doctrine is shaken to its foundation by the judgment of the Supreme Court of Louisiana, which was afterwards enacted in the code of that State. But the law of Louisiana only deals with a partial community of goods—that in after property acquired after marriage; whereas the law of this Colony provides for the universal community of *all* goods, both those possessed before marriage and what have been subsequently acquired. The Attorney-General was constrained to limit the universal community of this Colony, which exists by operation of law, to the qualified community of acquests. That he maintained to be effected by the arrival of persons married in England into their new domicile, where universal community, including of course community of acquests, exists. I cannot find any authority which will lead to the conclusion that such limited community exists in this Colony. Such community can only exist by contract. There is no express contract, therefore the Attorney-General says it is a tacit contract. Thus the argument is that the parties, on their arrival here, tacitly agreed to be bound, not by the law of the Colony, but by a modification of that law—a modification which persons married in the colony could only effect by ante-nuptial contract. But though on the general question I am inclined to agree with *Voet's* doctrine as more equitable and better founded on right principle than that of *Story* and *Hüber*, I do not think it necessary to decide the difference between them, inasmuch as, for the purposes of this case, the question in the Colony is settled by the proclamation of 1822. This is our statute law on the powers of disposition possessed by natural-born subjects of the United Kingdom. Parents are not to be fettered with the obligation of leaving their children the legitimate portions which would otherwise be the due of children whose parents are domiciled in the Colony. Married persons arriving here are to have the same rights as they would have had in England with regard to disposing of their property; and natural-born subjects,

who marry after their arrival, may by ante-nuptial contract retain the same rights of disposition, otherwise they are to be debarred from the privilege conferred by the proclamation. The term "property," as explained by Mr. Justice Menzies in *Caffyn v. Heurtley* (a), is beyond the possibility of doubt used in the sense of property which ordinarily in this Colony would be property in communion under the husband's control. If, then, this was the property over which, without reference to the wife's half in community or the children's legitimate portion, the husband, being a natural-born subject, could by ante-nuptial contract acquire the right of full disposal, so as to place him in the same position as though he had arrived here already married, it follows that the proclamation acknowledged in the man who arrived here already married the right which the settler who married in the Colony was entitled to acquire by ante-nuptial contract. Thus the proclamation, in my opinion, is equivalent to a declaration that the law as laid down by *Voet*, and those who agree with him, is the law of this colony; and that therefore the deceased was entitled to dispose freely of all the property, even although the whole had been acquired by his wife's industry. With this proclamation in existence, this is the conclusion at which I felt I could arrive with certainty. Probably, had it not existed, on the general principle the result would have been the same. The judgment must be for the defendant.

1861.  
Nov. 11.  
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Blatchford vs.  
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others.

[No order was made as to costs.]

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(a) 2 Menzies, 184.



## TRUSTEE OF SHEPPERSON vs. JONES.

*Insolvency.—Undue preferences.—Motion to set aside a sale.*

*Payment to one creditor under pressure without contemplation of insolvency will not per se amount to undue preference.*

1861.  
Nov. 30.  
—  
Trustees of  
Shepperson vs.  
vs. Jones.

The insolvent in this case, being indebted to the defendant in the sum of £700, had sold and delivered to him merchandize and goods to the value of £300 in the month of March, 1861. The insolvent swore that he did not contemplate insolvency at the time of effecting the sale, and it was found that the defendant had been very urgent in demanding a settlement and had threatened legal proceedings.

THE COURT held that there was no contemplation of insolvency as intended by the 84th section of the Ordinance, and gave judgment for the defendant.

## BROADWAY (TRUSTEE) vs. JAMIESON AND CO.

*Insolvent.—Bonâ fide payment to one creditor without pressure or intent to defraud.—Undue preference.—Ordinance No. 6, 1843, § 84.*

*A bonâ fide payment made by an insolvent to one creditor, without pressure and with no intention to defraud, may amount to an undue preference and be set aside.*

1861.  
Dec. 5.  
—  
Broadway  
(Trustee) vs.  
Jamieson & Co.

Action by the trustee of Mary Scheele, an insolvent, formerly Mary Delahunt, for the purpose of setting aside a payment made by the insolvent to the defendants, which, it was alleged, was invalid as constituting an undue preference.

The insolvent Mrs. Scheele in 1855 being then indebted

to Hovils & Russell, executed a bond of the value of £500 in their favour, which bond was still unsatisfied. On the 6th of October, 1860, Mrs. Scheele paid to the defendants the sum of £54 7s. 8d., she knowing at that time that her estate was insolvent and that it must come under sequestration. It was this payment which her trustee in insolvency sought to set aside as an undue preference. It appeared in evidence that early in 1860, the insolvent had sold her furniture by public auction, and had collected in the Mauritius and elsewhere certain debts then owing to her, and that her assets in all amounted to about £183. Her liabilities at that time were as follows: Hovils & Russell, £595 1s. 1d.; Deane & Johnson, £70; Fletcher & Co. £120; Russell & Co. £41 14s. 9d.; Jamieson & Co. (the defendants) £120; and a few smaller sums to other creditors. The insolvent set aside £100 for Hovils & Russell, the bond creditors; paid Deane and Johnson a percentage of their claim, and paid the defendants £54 7s. 8d., unintentionally overlooking the claims of the other creditors, and intending to make an equitable distribution of her assets. The trustee claimed the whole of her assets at the time when these payments were made in part satisfaction of Messrs. Hovils & Russell's bond.

1861.  
Dec. 5.  
—  
Broadway  
(Trustees) vs.  
Jamieson & Co.

*The Attorney-General* briefly stated the facts, and pointed out (1) that an insolvent is not allowed to distribute his own estate; (2) that the payment to the defendants, while a creditor who held a general bond was unsatisfied and the estate was on the eve of sequestration, must be treated as undue preference.

*Brand*, for the defendants, called Mr. Fairbridge, the attorney who had acted for them, who deposed that he had given Mrs. Scheele to understand that if she did not pay something on account of her debt to them, they would be obliged to sue her for it. He had also conducted some negotiations with others of her creditors, and was aware that Mrs. Scheele was insolvent when she made these payments.

BELL, J., said that the defendants, in his opinion, had no case at all. The insolvency of Mrs. Scheele at the date of the

1861.  
Dec. 5.  
—  
Broadway  
(Trustee) vs.  
Jamieson & Co.

payments was admitted. Then had there been any pressure? He could not see that the evidence adduced made this plea available. No doubt the insolvent had acted honestly, and it might be regretted that such things as preferential bonds existed, but as the law stood, they were bound to give force to such a bond, and their judgment would be against the defendants.

WATERMEYER, J., entirely concurred with the judgment of BELL, J. He agreed that the pressure exercised was not sufficient to carry the case out of the operation of the law respecting undue preference, and pointed out that the law of England went much further in allowing such payments than the Colonial Insolvent Ordinance, as had been decided by the Judicial Committee.

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*In re HARE AND GOUGH.*

*Injunction.—Restraint of transfer of land.—Right of action.*

*A party was restrained from transferring property pending an action concerning it.*

1862.  
Mar. 15.  
—  
*In re Hare &  
Gough.*

Motion to make absolute a rule *nisi* granted in Chambers by the Chief Justice, whereby the respondent was restrained from giving transfer to N. Stenhouse of a piece of land pending the result of an action to be brought. Hare stated in his affidavit that he had purchased a piece of land from Gough for £325, but on the following day Gough sold it to N. Stenhouse for £350.

*Watermeyer*, for the motion.

*Denysen*, for the respondent, said he would consent to the rule being made absolute if the action was brought against Stenhouse as well as Gough.

THE COURT made the rule absolute, leaving Hare to bring his action against Gough alone, with liberty to Stenhouse to apply to intervene in the action if he could lay materials before the Court to show why he should do so.

1862.  
Mar. 15.  
In re Hare &  
Gough.

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SWEMMER vs. BEHRENS.

*Judgment in the nature of provisional sentence.—Sale —Right of commission and percentage for collection.*

Action to recover £24 13s. 0d., the price of certain oxen sold to the defendant, and £1 4s. 9d. commission.

The sale of the oxen to the defendant was proved by evidence as were also certain conditions of sale. No mention of commission was made therein, but it was stated therein that purchasers who neglected to settle their accounts would be charged five per cent. for collection and interest on the overdue accounts.

1862.  
Mar. 27.  
Swemmer vs.  
Behrens.

*Barry*, for the plaintiff.

WATERMEYER, J., said that the Court would give judgment for the price claimed, with interest from the date of the sale, such judgment to have the effect of a provisional sentence. It would not, however, allow the claim for commission, as it was not mentioned in the conditions of sale, nor the sum claimed for collection, as no attempt to collect the sum due had been proved.

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## VAN DER WALDT vs. HARTMANN AND OTHERS.

*Death of party.—Joinder of widow.*

1862.  
Mar. 27.  
—  
Van der Waldt  
vs. Hartmann  
and others.

Action against several defendants for obstructing a water-course.

*Cole*, for the plaintiff.

*Barry*, for the defendant.

Counsel for the defendant took the objection that as one of the defendants was dead when the summons was issued his widow should have been made a party to the action.

THE COURT upheld the objection, with costs.

BOSWELL, *Applicant*, vs. JOHNSON, *Respondent*.*Custody of child.—Right of father.—Allowance.*

*A father was granted the custody of his child, although the persons with whom it resided treated it kindly, and the father had agreed to allow them to bring it up.*

1862.  
Mar. 27.  
—  
Boswell, *Applicant*, vs.  
Johnson,  
*Respondent*.

Application on behalf of a father for the custody of his child, a boy aged twelve years. It appeared from the affidavit that the child's mother died soon after its birth, and at her request her sister, the wife of the respondent, took charge of it, agreeing to bring it up if the father would promise not to take it away from her, which he did. Some differences arose between the parties, and it was asserted the boy was induced to treat his father disrespectfully. It was admitted the boy was kindly treated by the respondent and carefully brought up.

*Cole*, for the applicant.

*Barry*, for the respondent, opposed the application, and in the alternative asked for an allowance in respect of the maintenance of the boy.

1862.  
Mar. 27.  
Boswell, *Appli-*  
*cant.* vs.  
Johnson,  
*Respondent.*

THE COURT held that the application must be granted, as the father was *primâ facie* entitled to the custody of his child, unless there was evidence of his being a person of bad character. An allowance at the rate of £2 per month for the first six years of its life, and £2 10s. per month for the last six years, making a total of £324, was, however, granted to the respondent.

#### IN THE GOODS OF MAYNARD.

##### *Letters of administration.—Will in England.*

*Letters of administration were granted to three executors who had taken out probate of a will in England.*

Application for a grant of letters of administration to one R. D. Buchanan and C. Maynard, as executors of the will of C. Maynard, deceased. The deceased was possessed of property in the colony and also in England, and recently died in England, having made his will, whereby he appointed four persons as his executors, among them being Buchanan and C. Maynard. Buchanan resided in the Colony, and C. Maynard had recently arrived there. The object of the present application was that the landed property of the deceased in the Colony might be realized. An attested copy only of the will had been sent to the Colony. Three of the executors had taken out probate in England.

1862.  
April 16.  
In the Goods of  
Maynard.

*The Attorney-General*, in support of the application.

THE COURT held that letters of administration should be

PART I. C

1862.  
April 18.  
—  
In the Goods of  
Maynard.

granted to the three executors to whom administration had been granted in England, the grant to Buchanan to be reserved, suggesting that the latter should first have probate granted to him in England.

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THE TRUSTEE OF DANEELS ESTATE *vs.* VAN DER BYL & CO.

*Insolvency.—Undue preference.—Insolvent Ordinance, No. 6, 1843, § 84, 86, 88.*

*If a sequestration is substantially inevitable, the debtor must be taken to have it in contemplation, and if one creditor is then preferred to another, the intention of the debtor to prefer must be gathered from the circumstances of the case. The passing of goods from the debtor to the creditor, with the knowledge that no money will actually pass, is not a transaction in the "ordinary course of business" within the meaning of § 86. The words "or common consent" in § 88 must be read as signifying a consent made common by mutual expressions, and not a consent to be gathered inferentially from a set of circumstances.*

1862.  
July 2.  
—  
The Trustee of  
Daneels Estate  
*vs.* Van der  
Byl & Co.

Action by the trustee of the estate of Daneel & Son. The points decided are set out in the judgment of BELL, J.

BELL, J.:—This is an action by the trustee of the sequestrated estate of the Messrs. Van der Byl & Co. asking to have a sale by the insolvents to the defendants set aside, as operating as an undue preference to the defendants over the other creditors of the insolvents. The declaration alleges that the defendants had had large dealings with the insolvents; that in January, 1860, and before that date, the insolvents were unable to meet their engagements; that in the same month the insolvents were indebted to the defendants in £345 17s. 3d., consisting partly of two promissory notes of £135 19s. 6d., due on 1st January, 1860, and of

£19 14s. 9d., due on 1st April, and that the defendants, in order to gain a preference over the other creditors, on the 4th and 5th January, 1860, purchased from the insolvents goods to the value of £264 13s. 4d. The insolvents, it is alleged, contemplated at the time the sequestration of their estate, and intended by such to prefer the defendant over their other creditors. Accordingly, the defendants had set off the amount of the goods purchased against the debt owing to them by the insolvents. The declaration further alleges that this preference had been obtained by common arrangement and understanding. The words of the Ordinance being "collusive arrangement, mutual understanding or common consent." Upon this statement, the declaration prays that the defendants may be condemned to pay the £264 13s. 4d. for distribution among the insolvent's creditors, or to restore the goods purchased, and be declared to have forfeited their claim to rank in the insolvent's estate for that sum. To this declaration the defendants have pleaded the general issue. The declaration was originally framed as if the right of action had accrued to the plaintiff upon the principles of general law, but upon the Court calling attention to this, and intimating that as such action could lie at common law, the plaintiff explained that the action was intended to be rested on the 84th and 88th sections of the Insolvent Ordinance, and he was allowed to amend his declaration accordingly.

Before alluding to the evidence, we proceed to dispose of the legal point as to the 84th section of the Ordinance. The words of the section are "such insolvent contemplating at the time the sequestration either voluntary or otherwise of his estate, and intending thereby to prefer directly or indirectly such creditor." For the plaintiff it was argued that if the evidence showed a design on the part of the creditor to obtain a preference, that was strong evidence to show an intention on the part of the insolvent to give a preference; on the other hand, it was argued for the defendants that the evidence must show that sequestration was present in some way to the mind of the insolvent before it can be said that he contemplated the sequestration of his estate, and that the intention of the insolvent to prefer is not

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to be gathered from the circumstances of the case, but from the state of the insolvent's mind alone. With regard to the argument of the plaintiff, it is wholly untenable, in so far as the case is rested on the 84th section. The section is silent as to the contemplation or intention of the creditor. However manifest, therefore, his design, in what he did himself or succeeded in getting the insolvent to do, may have been to get a preference over the other creditors, that must be quite immaterial in considering what was in the contemplation and intention of the insolvent at the time of the transaction, upon which alone its validity or invalidity depends, except in so far perhaps as the disclosure of the creditors' design to the insolvent may be evidence to show what was the insolvent's intention. As to the argument of the defendants, it is equally untenable. For decisions of this Court have established that contemplation of sequestration is to be gathered from all the circumstances of the case, and not to be dependent on what may have been passing in the mind of the insolvent, see also *Freeman v. Pope* (a). Not to mention other cases, this Court, in *Smith v. Carpenter* (b), found that the insolvents contemplated sequestration, and intended to prefer within the meaning of the 84th section, although they positively swore that they did not believe themselves to be insolvent, and had no intention to prefer the creditor by the impugned transaction. That judgment was affirmed on appeal. The rule, therefore, for the reading of this section must now be conclusively taken to be, that where the circumstances of the debtor are such that sequestration was actually impending, and substantially inevitable at the time of the transaction challenged, he must be taken to have contemplated sequestration, whatever may have been passing in his own mind, and that where, under such circumstances, he has done what has in fact produced a preference to one creditor over his other creditors, his intention in so doing is "to be determined upon all the circumstances of the case." Such being the rule for the construction of the 84th section, the difficulty is in each case whether its facts

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(a) L. R. 5 Ch. App. 538.

(b) 12 Moo. P. C. 101.

bring it within the purview and operation of the section. [The learned judge then proceeded at great length to consider the facts of the case, and held that there was an intention to prefer, and proceeded as to the other legal points as follows:] The defendants, however, argued that the transactions were in their form done according to their ordinary course of business, and were therefore protected by the 86th section of the Ordinance unless the plaintiff could prove that they took place through a collusive arrangement, mutual understanding or common consent. Whether the words "ordinary course of business" in this section are to be read with reference alone to the details of the particular transaction called in question, or with reference not only to these details but to the character of the general dealings between the parties and the effect upon them of this particular question, it is not necessary to decide. It is sufficient to read the words in question as if they referred solely to the details of the particular transaction. Reading them in that sense, it is impossible to say that what took place on the 4th and 5th of January can be called a sale properly so-called. For in a sale the fixing and payment of the price by the purchaser are as essential as the choice of the goods and the delivery of them by the seller. But here the seller must have known that the price was not to be paid. In fact, the delivery of the goods was neither more nor less than an alienation by a debtor to a creditor of so much goods as would pay his debt. It is true that a promissory note for the price was made out and sent with the invoice to the defendants for their signature, but this was a mere pretence, and the Daneels must be taken to have known that the defendants would never pay for these goods. Therefore we think that these sales are struck at by the 84th section, and that the defendants must pay their amount to the plaintiffs.

But the declaration prays also that the defendants may be declared to have forfeited their claim under 88th section. We do not think this contention can be supported. The object of the defendants was clearly to obtain a preference in setting off these goods against their debt. But there is no evidence that the sales were made by the Daneels through any previous collusive arrangement or through any mutual

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understanding with the defendants. On the contrary, we think that Daneels and the defendants were acting independently, the one to secure and the other to give a preference. The Ordinance leaves another term, "common consent," to be considered, and it is to be noticed it is used disjunctively in the section prefixed by the word "or." Reading these words strictly, it may be said that consent to a preference being obtained by the defendants was common to the minds of both parties; but we have come to the conclusion that to so highly penal a clause a liberal construction should be given, and that the words in question should be read as signifying a consent made common by the mutual expression from the one party to the other. Reading the words in this way the case does not fall within the section, for it is only inferentially from the state of Daneels' circumstances and from his acts that we ascertain the intention to prefer, and this excludes any notion of a collusive arrangement, mutual understanding or common consent.

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MARILLAC BROTHERS vs. THE EQUITABLE FIRE INSURANCE  
AND TRUST COMPANY.

*Policy of Insurance.—Proof of damage.—Costs.*

*In a dispute as to damages on a policy of insurance, the parties may be ordered to divide the costs, if the Court is of opinion that the litigation is due to unreasonable conduct on both sides.*

1862.  
Aug. 8.  
—  
Marillac  
Brothers vs.  
Equitable Fire  
Insurance and  
Trust Company.

Action to recover £500 on a policy of insurance effected by the plaintiffs with the defendant company on stock-in-trade destroyed by fire.

The only question in dispute was the amount which the defendants were liable to pay.

*Densyssen*, appeared for the plaintiffs.

*Watermeyer*, for the defendants.

1862.  
Aug. 8.

Marillac  
Brothers vs.  
Equitable Fire  
Insurance and  
Trust Company.

After hearing the evidence, THE COURT gave judgment for the plaintiffs, holding that the amount claimed had been proved. At the same time the plaintiffs had not, prior to the action, furnished the company with the "satisfactory evidence" to which they were entitled of the extent of the loss; while the agent of the defendants might, had he exerted himself, have obtained satisfactory proof, and moreover had not informed the plaintiffs what proof was needed. The Court, therefore, ordered the costs of both sides to be taxed, the total of both to be divided equally between the parties.

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SWART vs. TALJAARD.

*Co-proprietors.—Liability for damage.*

*One co-proprietor has no legal right to damage the property of the other co-proprietor, though he may in the first instance have a right to object to the manner in which such co-proprietor is using the land.*

Appeal against a decision of the Resident Magistrate at Swellendam. The plaintiff and defendant were joint proprietors of a farm, and the plaintiff selected one part for a garden, planted it, and enclosed it. Whilst so doing, the defendant stated that he objected to the plaintiff planting this piece of ground, and that he would send his son to pull up the plants.

1862.  
Aug. 9.

Swart vs.  
Taljaard.

Nothing further, however, occurred until two or three months afterwards. The defendant allowed a bull to get into the plaintiff's enclosed piece of ground, and destroy his plants by grazing on them. The plaintiff brought his action

1862.  
Aug. 9.  
—  
Swart vs.  
Taljaard.

against the defendant, and the Resident Magistrate gave judgment for the claim. Against this decision the defendant appealed.

*The Attorney-General* was for the appellant.  
*Barry*, for the respondent.

THE COURT held that the defendant had a right in the first instance to object to the manner in which the plaintiff was using the ground, but having acquiesced in the particular use of the land for two or three months, he had no legal right to allow his bull to destroy the plaintiff's plants, and they accordingly dismissed the appeal.

### MOSTERT vs. SMIDT.

#### *Interdict.—Action of Trespass.*

1862.  
Aug. 14.  
—  
Mostert vs.  
Smidt.

Motion for an interdict to restrain the defendant from riding over, ploughing, or otherwise trespassing on a certain farm, the property of the applicant.

The application arose from a dispute as to the boundaries of two adjacent farms.

*F. S. Watermeyer*, for the applicant.

THE COURT refused the motion, on the ground that the applicant's proper course was to bring an action of trespass.

## DREYER vs. BERRY.

*Costs.—Contempt of Court.—Motion.*

*A defendant not having complied with a Judgment of the Court, proceedings were taken against him. He obeyed the order of the Court before the hearing. Held, liable to pay all costs.*

Application for the costs of a motion on behalf of the plaintiff. It appeared that Dreyer sold to Berry an hotel, with its contents, on a long credit. Berry covenanted in the deed of sale to give a guarantee by one Mr. Master and Mr. Crump, against any loss which might arise by Berry removing any of the plant, &c., during the period of credit. After considerable litigation Mr. JUSTICE WATERMEYER gave Judgment in the Circuit Court in favour of the plaintiff, and decreed *inter alia* that Berry should within a fortnight give a guarantee, as he had contracted to do. Berry did not comply with this order for six weeks, and then did not give a guarantee in the exact terms specified in the contract. Dreyer refused to accept this guarantee, and gave notice of motion to commit Berry for contempt of Court. Berry thereupon tendered a proper guarantee.

1882.  
Aug. 21.  
Dreyer vs.  
Berry.

*Colt*, for the plaintiff, argued that Berry should pay all costs incurred by and incidental to the notice of motion.

*Brand*, contra.

THE COURT held, that Berry not having complied with the judgment of the Circuit Court, he must pay all costs incurred by the plaintiff in enforcing it, including the costs of the present motion.

TRUSTEE OF ESTATE OF MESSUM *vs.* SEARIGHT & CO.*Fraudulent preference.—Right of action.*

1862.  
Aug. 27.  
Trustee of  
Estate of  
Messum *vs.*  
Searight & Co.

Action by the trustee of an estate of one Messum, an insolvent, against Searight & Co., and also against one J. Ausdell personally. The declaration alleged that Messum being indebted to Searight & Co., sold to Ausdell, a partner in the firm, certain property in Natal for the sum of £375, but did not receive any purchase-money, the estate going, in fact, to liquidate Messum's debt. The plaintiff therefore brought this action on the ground of a fraudulent preference to recover the amount of the purchase-money, or in the alternative £400 damages.

*Denysen* and *Watermeyer*, for the plaintiff.  
*Brand*, for the defendant.

THE COURT dismissed the action with costs, since the declaration did not contain an allegation that Ausdell purchased for the benefit of Searight & Co.; and therefore there was no ground for saying that this was a fraudulent preference. The proper course was for the plaintiff to sue Ausdell for the purchase money.

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*In re KEIGHLEY, an Insolvent.*

*Provisional trustee.—Small number of creditors applying.—*  
*Discretion of Court.*

*The Court has power to appoint a provisional trustee against*  
*the wishes of the creditors of an insolvent.*

1862.  
Aug. 28.  
*In re Keighley,*  
*an Insolvent.*

Motion for the appointment of a provisional trustee for this insolvent's estate, supported by creditors with claims

to the value of £1200 out of a total of £4000, the application being made two days after the surrender of the estate.

1862.  
Aug. 28.  
In re Keighley,  
an Insolvent.

*Watermeyer*, for the motion.

THE COURT refused to appoint the person nominated by the creditors, and selected another gentleman for the post of provisional trustee against the wishes of these creditors.

# TRUSTEES OF ROOS vs. BECK AND MEIRING.

*Undue preference.—Payment of notes before due.—Course of business.—Insolvent Ordinance, No. 6, 1843, § 84.*

*The presumption of law when a negotiable instrument is paid before its due date, and not in the ordinary course of business, is that the payment constitutes a fraudulent preference.*

Action by the trustee of an insolvent to recover from the defendants the amount of two promissory notes for £83 17s. and £98 15s. 9d., paid under the following circumstances. In January, 1860, Roos being in an embarrassed position, and being sued by his landlord for rent, a Mr. Keyter had removed the cattle from his farm, the price of which was agreed at £500. Keyter retained a balance of about £300 in his hands, and Roos gave to the defendants an order upon Keyter for the amount of the two notes made by him (Roos) and held by the defendants. These notes, which fell due on the 4th and 6th of February respectively, were paid by Keyter on January 16th, Keyter giving his own promissory note due in the following May for the amount. This transaction, it was contended, came

1862.  
Aug. 28.  
Trustees of Roos  
vs. Beck &  
Meiring.



1862.  
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Trustees of Roos  
vs. Beck &  
Meiring.

within the provisions of the 84th section of the Insolvent Act.

*Cur. adv. vult.*

THE COURT decided that there was an evident intention on the part of Roos to give an undue preference to the defendants over other creditors, and consequently gave judgment for the plaintiff with costs. The notes had been paid before they were due, and therefore the transaction could not be regarded as in the ordinary course of business. The defendants would have a right to prove as concurrent creditors against Roos's estate, there being no case made out against them under the 88th section of the Act.

#### THE CAPE DIVISIONAL COUNCIL vs. TAYLOR.

*Costs.—Resident Magistrate.*

*The Resident Magistrate has a discretion as to costs. The Secretary of the Cape Divisional Council not allowed to charge an agent's fee.*

1862.  
Aug. 29.  
The Cape  
Divisional  
Council vs.  
Taylor.

Appeal against the decision of the Resident Magistrate of Cape Town, by which he disallowed to the Secretary of the Cape Divisional Council, who conducted the case before him, the usual agent's fee of 10s. 6d.

*Watermeyer*, for the appellant.

*Cole*, for the respondent.

THE COURT held that the magistrate had a discretion as to costs, and they would not interfere with it. In the present case the magistrate had acted rightly in disallowing the fee in question, as the secretary was entitled to appear in Court and conduct the case without being an enrolled agent, and therefore it was not right he should receive payment as if he had appeared as an independent agent.

## COLLINGS vs. EXECUTORS OF HARTOG.

*Will.—Construction.—“All household furniture.”—“All other movable property”—Evidence of extrinsic circumstances.*

*The Court will admit extrinsic evidence in order to elucidate the meaning of words used in a will, and the general rule of construction may be varied by such evidence.*

Judgment in this case, the arguments in which had been heard some time previously, was delivered as follows:—

1862.  
Aug. 29.  
Collings vs.  
Executors of  
Hartog.

THE CHIEF JUSTICE:—The question in this case turned upon the construction of certain words in the testator's will, by which he gave to the plaintiff certain property, to wit, “All my household furniture of whatever nature and description, glass and crockery, silver and plate, and all other movable property which at this moment is or may be found in the said house and premises situated in Sir Loury Street aforesaid at my decease.” If we had been asked to construe these words without reference to any extrinsic circumstances existing at the time when the will was made, I think we should have been bound to hold that “all other movable property” meant property *ejusdem generis*, as that before mentioned. There are many decisions to show that “household furniture” must be construed as referring to articles such as would be in a well-furnished house, or in a house furnished in the manner in which the house in question was furnished. However, all wills are to be construed according to what the Court can find was the testator's intention; and it is a well-established rule of law that, in considering instruments of this kind, the parties should have an opportunity of showing by evidence the circumstances existing at the date of the will. At that date, it has been proved that there were several pianos in this house, all except one deposited there for the purpose of being sold, and they were subsequently sold. Afterwards the testator bought a large number of silver watches and other articles, which he deposited in this same dwelling-house, and which were evidently

1882.  
Aug. 29.  
Collings vs.  
Executors of  
Hartog.

stored there to be sold. After that evidence, which shows what kind of movable property was in the house at the date of the will, I should feel great difficulty in arriving at the conclusion that we ought to apply the ordinary rule to the construction of these words. The extrinsic circumstances which have been proved take the case out of that rule. I am perfectly satisfied that the Court has power to accept such evidence, and that all the property in question passed under these words, "all other movable property."

BELL, J.:—The words used in this case, though sufficient in the ordinary use of language to embrace the articles of merchandize claimed by the plaintiff, have long had a particular interpretation in courts of law, namely, that they should include only things *ejusdem generis* as what has been previously given or mentioned in the gift to the same persons. This rule applies where a testator makes a specific bequest and concludes with a general gift. On the general principles of construction, as laid down in *Voet* (xxxiv. 5, 4) and *Roper* (232), I should decide against the plaintiff's claim. But the evidence which has been given inclines me to a different conclusion; and I am strengthened in this by the fact that I do not find that there is or are any known person or persons who would take what is not bequeathed to the plaintiff. The residue is bequeathed to the testator's "poorest relations," and it would probably exhaust all the estate to discover who these are. I have not been able to find any case exactly in point. The nearest is that of *Cook vs. Oakley* (a), where the testator, a sailor, then abroad, gave the legatee his "red box arrack," and then gave him "all things not previously bequeathed;" and it was held that "all things" did not include a leasehold estate which had come to the testator during his absence and without his knowledge. It seems to be implied that the leasehold estate would have passed if the testator had known that he possessed it. Applying that analogy, I think, though I arrive at the conclusion not without difficulty, that the testator by

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(a) 1 P. Wm. 302.

framing the bequest in this manner must be supposed to have intended by the bequest of all property which might be found in the house and premises to give the goods so placed by him in the house to the legatee.

1862.  
Aug. 29.  
Collings vs.  
Executors of  
Hartog.

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REGINA vs. RISH AND OTHERS.

*Temporary use of an article.—Theft.—Animus.*

*When a man takes an article for a temporary purpose, and without the intention of depriving the owner of its permanent use, he is not guilty of theft.*

In this case, Rish and other prisoners, private soldiers, had been tried at the criminal sessions for stealing a boat. This boat they took from its moorings in Table Bay, and crossed in it to Blueberg for the purpose of making their escape from service, and not with the intention of keeping it. The boat was destroyed by the force of the sea. The jury found at the trial that the prisoners intended to take the boat for the purpose of making their escape.

1862.  
Aug. 29.  
Regina vs. Rish  
and others.

BELL, J., reserved judgment.

The case now came before the Court for argument as to whether under these circumstances the prisoners could be convicted of stealing.

*Denyssen, Acting Attorney-General* for the prosecution, argued that by Roman-Dutch law an unauthorized taking of another man's property was equivalent to a theft.

*Cole*, for the prisoners, argued that there must be an intention to steal in order to constitute a legal crime.

THE CHIEF JUSTICE:—I treat the finding of the jury as I should a finding that a boat had been taken for the purpose

1862.  
Aug. 29.  
Regina v. Rish  
and others.

of crossing a canal, leaving the boat to be recovered by the owner after it had been used. If the prisoners had taken the boat with the knowledge that in all human probability it would be destroyed, so that the owner would be deprived both of the possession of it and property in it, I should have held the taking to be a felony, but the evidence does not show whether the boat was in jeopardy or not, nor have the jury made any finding on the point. I therefore think that a verdict of not guilty must be entered.

BELL, J. :—I am of opinion that a verdict of not guilty must be entered in this case. The evidence showed that the prisoners, for the purpose of making their escape, took a dingy to enable them to get on board a cargo-boat. If the evidence had shown that the prisoners took this boat with an intention to appropriate the boat so far as was necessary for other purposes, and to deprive the owner of any possibility of regaining possession of it, then that would probably have amounted to the crime of theft. But in the present case the jury have left it open whether the prisoners intended to deprive the owner of his property in the boat, and therefore the Court is unanimously of opinion that as regards the charge of theft a verdict of not guilty must be entered.

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#### SMITSDORF vs. HORNE.

*Seduction.—Party entitled to bring action for proof of paternity.*

*The general rule that the mother's oath as to the paternity of her child being sufficient when the defendant admits having had intercourse with her, will not be followed if the mother's testimony be otherwise untrustworthy.*

1862.  
Aug. 30.  
Smitsdorf vs.  
Horne.

Action for seduction by the plaintiff as mother and natural guardian of Elizabeth Reynolds against the defendant. In

a second count the plaintiff claimed damages for the lying-in expenses of her daughter, and for the maintenance of the child born. The principal claim was abandoned in the course of the case, it being proved that the woman Reynolds had not been a virgin at the time of the alleged seduction, and by the law of the Colony a woman, unless then a virgin, is not entitled to bring this action.

1862.  
Aug. 30.  
—  
Smitdorf vs.  
Horne.

*Cole*, for the plaintiff, contended that she was entitled to succeed on the second portion of the claim for expenses incurred by the plaintiff, and argued that the fact of paternity was sufficiently established by the oath of the mother of the child, and therefore that reasonable payment must be made for the expenses consequent upon the birth, and a monthly alimentation allowance. He cited *Van der Linden*, pp. 251–252, in support of the legal position that the mother's oath was by itself sufficient evidence, especially where, as in the present case, the defendant did not deny having had intercourse with the mother.

*Watermeyer*, for the defendant, submitted that the oath of a woman in such a case as the present must be considered in the light of surrounding facts. The Court might reasonably disbelieve that oath, and if that were so they were not bound to decide in favour of the claim. He referred to a note by *Groenwegen* on a passage in *Grotius*.

[WATERMEYER, J.:—What do you say to the authority of *Voet* (xlviil. 5, 6) when he lays down that if a man admit having had connection with a woman but denies paternity, the woman is to be believed, although it be proved that other men have been intimate with her, unless the man can show that from the date upon which he had connection with her it would be physically impossible for him to have been the father of the child?

The learned counsel suggested the passage in *Voet* was due to the influence of defective physiological knowledge, and argued that when distinct perjury by the woman herself was proved, as in this case, where she had sworn that she was a virgin and had been proved to be a prostitute, her statement as to the paternity would not be believed.]

1862.  
Aug. 30.  
Smitsdorf vs.  
Horne.

THE CHIEF JUSTICE said that the woman could not be believed on any one particular to which she had sworn. The law, when it enabled a woman, in spite of connection with several persons, to swear to the paternity of her child, impliedly supposed that she was able to state who the father was; but even if this woman had the ability, her selection of the defendant could not be trusted.

WATERMEYER, J., concurred, pointing out that a prostitute may be believed when she swears to the paternity of her child; but that the law does not compel the Court to accept such an oath, and after the false swearing of the woman in this case, it was impossible to conclude that she was speaking the truth when she selected the present defendant.

Judgment for the defendant, without costs.

#### IN THE GOODS OF CHRISTINA VAN WYCK.

*Executor-dative.—Appointment.—Creditors and next-of-kin.*

*It is improper for a few small creditors to appoint an executor-dative without the consent of the next-of-kin and the general body of creditors.*

1862.  
Aug. 30.  
In the Goods of  
Christina van  
Wyck.

Application to set aside the appointment by the Master of Nicholas Rass, the surviving spouse, as executor-dative, and Mr. St. George Boyes, law agent, appointed in his place.

It appeared that on August 8th, the usual meeting of the next-of-kin and the creditors had been summoned by edict at the office of the resident magistrate, Calvinia. At that meeting Boyes and one Heilbrun, creditors for small amounts, had at first alone attended, and unanimously appointed Boyes executor-dative. The next-of-kin and

other creditors finding on their arrival what had taken place, forwarded a protest to the Master, who accordingly rescinded the appointment of Boyes and appointed Rass executor-dative.

1862.  
Aug. 20.  
—  
In the Goods of  
Christina van  
Wyck.

*Barry*, for the motion.

THE COURT refused to make the order, and were of opinion that the Master had acted rightly; the Court would be no party to attempts, by small creditors or others, to obtain appointments without the consent of the general body of next-of-kin and creditors, and to their prejudice.

# STENHOUSE v. CRESSY.

*Principal and Agent.—Money lent.—Estate assigned.*

*A general agent has no implied power to borrow money for the purposes of his principal's business. But if he pays over to a creditor moneys not specifically appropriated by his principal, the creditor may apply such moneys to the reimbursement of advances that he has made. For having to press for the whole debt when the debtor has assigned his estate, is not necessarily a fraud on the other creditors.*

Action to recover the sum of £520 lent by the plaintiff to a Mr. Thomas, the agent of the defendant, in the months of November and December 1858 and January 1859, and at that time managing his business, on behalf of the defendant and for the purposes of the defendant's business. The defendant had since assigned his estate for the benefit of his creditors, but on his undertaking to pay this sum to the plaintiff, the latter consented not to press his full claim at the time, as his so doing would have necessitated the sequestration of the estate.

1862.  
Sept. 4.  
—  
Stenhouse vs.  
Cressy.

*Watermeyer*, for the plaintiff.

*Barry*, for the defendant.



1862.  
Dec. 12.  
—  
Stanhouse vs.  
Cressy.

**THE CHIEF JUSTICE :—**In this case the plaintiff seeks to recover from the defendant the sum of £520, under somewhat peculiar circumstances. It appears that previous to 1858 the plaintiff had made loans to the defendant personally, and that in that year the defendant left Cape Town on business, giving a power of attorney to Mr. Thomas to manage his affairs on his behalf. This power was in general terms, and seems to have been known to the plaintiff, who on several occasions, between November 1858 and January 1859, lent to Thomas various sums, amounting in all to £620. Thomas did not swear that he was specially requested by the defendant to borrow these sums, though he said that he informed the defendant of his having borrowed money from the plaintiff. The plaintiff clearly was informed that the money was for the use of the defendant, and the entries in his ledger showed separate accounts of what he had advanced to Cressy direct, and of the advances to Thomas as Cressy's agent. In December 1859, the defendant gave to Thomas a bill for £400, with instructions to him to get it discounted and to pay the proceeds to the plaintiff, on account of his (the defendant's) personal liabilities. The proceeds, £392 6s., were paid to the plaintiff, who credited them to Thomas' account as the defendant's agent, thereby reducing that account to £227 14s. Thus in February 1859, when the defendant found himself in an embarrassed position, there were two sums standing against him in the plaintiff's ledger, one of £683 5s., his personal debt, and the other of this £227 14s. In that month an arrangement was made by the defendant with all his creditors, and a notarial deed drawn up by which he assigned all his estate to trustees, and the creditors in consideration of this extended the time for payment of their claims by instalments, to be due at 3, 9, and 24 months' date. The plaintiff appeared in the schedule as claiming £683 5s.; and after a conversation with the defendant, at which the defendant complained that Thomas had mismanaged his affairs, he agreed to alter that sum in the schedule to £390 19s., by crediting the defendant's personal account with the proceeds of the bill for £400 (£392 6s.), and transferring £100 from the debtor side of the agency account to

the debtor side of the defendant's personal account. Thus the amended sum of £390 19s. was entered in the schedule, and this alteration was plain to everyone; and the plaintiff alleges that it was made on the defendant's express promise that the balance of the two accounts, £520, should be paid to the plaintiff at some future time. This the defendant denies; but I think it is clearly proved that he promised to pay the difference between £390 19s. and the £683 5s. for which he was personally indebted; on the other hand, I do not think that there is proof that he promised to pay the balance of the agency account. That being so, it is necessary to enquire what were the plaintiff's rights, irrespective of the promise, in respect of the agency account at the time when the notarial deed was executed. I am of opinion that the defendant was not liable on this agency account for the money borrowed by Thomas. Thomas was a general agent for carrying on the defendant's business; but all authority shows that an agent has no power to borrow money unless expressly authorized to do so: *Hawtayne vs. Bourne* (a), where an agent managing a mine was held not empowered to borrow money even in a case of extreme necessity. However, the plaintiff having lent the money to Thomas was entitled to appropriate the proceeds of the bill to the agency account, as the defendant, by indorsing it in blank and handing it over to Thomas, thereby empowered him to treat it as his own money.

As for the alteration of the plaintiff's claim in the schedule, this was a mere act of kindness on his part, and does not come under the principle that a secret understanding between one creditor and the debtor is illegal, because in this case there was no preference given to the plaintiff, the other creditors being paid in full, and from the first they could see the real amount of the plaintiff's claim. There will therefore be judgment for the plaintiff for £292 6s., the difference between £683 5s. and £390 19s., but without costs.

WATERMEYER, J., concurred.

1862.  
Dec. 12.  
—  
Stenhouse vs.  
Creasy.

DICKSON & Co. v. THE EXECUTORS OF BLAIKIE AND  
OTHERS.

*Ship.—Latent defect.—Damage to cargo.—Merchant Shipping  
Act, 1854, § 504.*

*A consignee of a cargo which has been damaged owing to a latent defect in the ship when the damage exceeds the value of the ship and freight, is entitled to such value without any deductions on account of the cost of repairs, stores, or similar expenses.*

1862.  
Sept. 6.  
Dickson & Co.  
vs. The  
Executors of  
Blaikie and  
others.

Action to recover from the defendants, the owners of the brig *Centaur*, damages for injury to a cargo shipped on board by the plaintiffs, by reason of a leak in the vessel. A contract had been entered into by the shipowners' agent to ship the cargo at Rio and convey it to Cape Town. After the greater part of the cargo had been put on board, the vessel sprung a leak, and in consequence the cargo had to be unloaded, and the damaged portion sold at Rio, realizing £1092. The remaining two-thirds was re-shipped and brought to Cape Town. The consignees of the cargo had lost about £4000, which was admitted to be in excess of the value of the ship and freight. The plaintiffs, who represented all the consignees who had suffered loss, claimed (1) the amount realized by the sale of the damaged portion; (2) the full value of the ship and freight. The defendants had applied the proceeds of the sale towards repairing the ship, purchasing stores, and other expenses, which they claimed to deduct from these proceeds, leaving a balance of only £278. The points in dispute were: (1) What was the real value of the ship? (2) Were the defendants entitled to make the deductions?

*Barry, and Watermeyer, for the plaintiffs.* By the Merchant Shipping Act 1854 we are limited to the value of the ship and freight. We say that it is shown that the value is £1000. The value must be taken to be that of the ship immediately before the discovery of the defect which caused

the accident. There is no rebutting evidence brought forward by the other side. As to the amount of freight earned, we admit that other goods were carried in the ship besides our cargo; but we claim to receive the full freight, £551, which the vessel would have earned had it proceeded on its voyage as originally intended, without any deductions. We are not in any way liable to pay for the repairs, stores, and other disbursements made by the defendants for the purpose of prosecuting this voyage. We are willing to allow for the expenses of the sale of the damaged goods. It is clear from the authorities that the owners, having entered into the contract with us, were bound to carry it out: they have, however, no right to charge us with any deductions.

*Denysen*, for the defendants: We have offered to give up the ship or to value her at £500. We have also offered the freight earned, less the deductions which we say we are entitled to make.

**THE CHIEF JUSTICE:**—The plaintiffs are entitled to damages and the tender made is insufficient. This case is governed by the 504th section of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which provides that no shipowner shall be liable for damages occurring through any accident traceable to any unknown defect in the ship, beyond the value of the ship and the freight due or to become due. The first question for our decision is, what was the value of the ship? There is considerable diversity of opinion on this point between the witnesses on either side; but the rule which we must follow is that laid down by Wood, V. C., in *The African Steam Ship Co. vs. Swaney & Kennedy* (a), that the value of the ship if sold immediately before the accident occurred must be ascertained. The plaintiffs' evidence not being satisfactory on this point, we are of opinion that £800 was the proper value of the ship, and we accord that sum to the plaintiffs. Next we have to deal with the deductions claimed. The actual freight earned was £551 12s. 8d.; and this sum the defendants are willing to bring into Court, provided that they are allowed to make deductions from the price of the

1862.  
Sept. 6.  
—  
Dickson & Co.  
vs. The  
Executors of  
Blakie and  
others.

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(a) 25 L. J. N. S. 870.

1862.  
Sept. 6.  
Dickson & Co.  
vs. The  
Executors of  
Blaikie and  
others.

damaged cargo for stores, repairs, and other expenses. I confess that from the commencement of the case, I have been of opinion that deductions for repairs ought not to be made. It seems to me that the charges for stores, provisions, surveys, and other disbursements which were necessary for the purpose of enabling the ship to earn freight are in the same category and cannot be deducted by the defendants. The Act clearly intended that the consignees under such circumstances should be entitled to the gross freight. The defendants, however, have a right to deduct the charges incurred in the landing and storing and in the sale of the damaged cargo, and unless some agreement can be made between the parties, we must direct an inquiry to be taken as to the proper amount of these charges.

WATERMEYER, J.:—The case of *The Benares* (a) is very similar to the one now before us. The *Benares* sank another vessel and the Court condemned the owners in damages to the extent of the value of the vessel and freight. The total freight was £3188, but deductions were sought to be made from this to the amount of £2466. The Court held that the owners of the sunken vessel were entitled to the full value of the ship and the gross freight, although the disbursements were necessary in order that the freight might be earned. It was admitted in that case that such deductions could not be made from the value of the ship, and it was decided that they could not be made from the gross freight; but the defendants here seek to set off against the proceeds of the sale of the damaged portion of the cargo the same disbursements, and this is only an indirect attempt to deduct them from the ship and freight. Our judgment is for the plaintiffs for £800, the value of the ship, and for the gross freight; while there must be an inquiry as to the amount due to them in respect of the proceeds of the sale, unless the parties can come to some arrangement as to the expenses which are to be deducted from the damaged goods.

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(a) 7 Notes of Cases. L.

[NOTE.—An arrangement was ultimately entered into by which the defendants were allowed £300 for the expenses of the sale as the proportion of the £481 which they claimed that was fairly chargeable against the shippers.]

1862.  
Sept. 6.  
—  
Dickson & Co.  
vs. The  
Executors of  
Blakie and  
others.

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*Re EDWARDS, an Insolvent.*

*Insolvent.—Absconding.—Bail.—Provisional Trustee.*

*When an insolvent is suspected of being about to abscond, he may be called upon to give bail for his appearance, and in default may be arrested.*

Motion for the appointment of a provisional trustee of the estate of the insolvent, and also for an order for the insolvent's arrest, on affidavits setting out that Edwards had surrendered his estate, and immediately afterwards had sailed for Port Elizabeth, intending, as it was believed, to get out of the jurisdiction of the Court, and taking a considerable portion of his assets with him.

1862.  
Sept. 6.  
—  
*Re Edwards,*  
*an Insolvent.*

*Denysen*, for the motion.

THE CHIEF JUSTICE:—We appoint Mr. Steytler provisional trustee, and we order the insolvent to give bail in £250 to appear at the first meeting of his creditors; if he does not give bail, he must be taken into custody. It will be open to him to apply to have the amount of bail reduced, or to be discharged altogether. You must serve copies of your affidavits upon him, in order that he may know what is charged against him.

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## REGINA vs. MORGAN.

*Merchant Shipping Act, 1854—Misdemeanour.*

*Although by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 239, a master or seaman may be guilty of a misdemeanour, and punishable accordingly, yet as a Resident Magistrate can only award three months' imprisonment, this is the limit of punishment in the cases of offences tried before him under 17 & 18 Vict. c. 104, s. 239.*

1862.  
Sept. 12.  
—  
Regina vs.  
Morgan.

W. Morgan, boatswain of the ship *Golden Fleece*, had been tried before the Resident Magistrate of Simon's Town for wilful neglect of duty and insubordination, under 17 & 18 Vict. c. 104, s. 239. The Resident Magistrate found him guilty, and sentenced him to six months' imprisonment with hard labour.

*The Acting Attorney-General* appeared in support of the conviction.

THE COURT held, that as the Resident Magistrates had power to sentence a prisoner to imprisonment for three months only, they had not jurisdiction to award the larger punishment allowed by the Imperial Act. The punishment in the present case must therefore be changed from imprisonment for six months to imprisonment for three months.

## TUCKER, Appellant, vs. JOSS, Respondent.

*Appeal Summons—Amendment.—Costs.*

*When an action was brought against the trustee of an insolvent estate personally, and judgment was given against him, the Court on appeal ordered the judgment to be amended, so as to make it one against the estate of the insolvent. The trustee to have his costs out of the estate.*

1862.  
Sept. 17.  
—  
Tucker,  
Appellant, vs.  
Joss, Respondent.

Appeal against a decision of the Resident Magistrate of Cradock, in an action brought by one K. Joss against

H. Tucker, to recover the value of an ox. The ox had been delivered to Tucker, as trustee of the insolvent estate of W. J. Wells, by the Resident Magistrate on the supposition that it was the property of the insolvent. Being informed that Joss claimed the ox as one which he had lost five years before, although there was evidence that Tucker had purchased it in good faith, Tucker held the ox for some days, and then sold it, Joss not making any claim in respect of it. At the trial Tucker argued that he should have been sued in his capacity of trustee, and that the summons should be amended. Joss' agent objected to any amendment. The Magistrate overruled the objection, and judgment was given against Tucker personally. Against this judgment Tucker appealed.

1862.  
Sept. 17.  
—  
Tucker,  
Appellant, vs.  
Joss, Respondent.

*Watermeyer*, for the appellant.

*Brand*, for the respondent.

THE COURT under the Magistrates' Courts Act, section 33, amended the judgment of the Court below by inserting the description of Mr. Tucker as trustee of the insolvent estate of Wells, so as to make it a judgment against the estate. Tucker to have his costs in the Court below and of the appeal out of the estate. Joss to have his costs in the Court below out of the estate, but not his costs of the appeal, since it was necessitated by the objection of Joss' own agent, and by the wrong decision of the Magistrate.

#### VENTER vs. GREEN AND ANOTHER.

*Vendor and Purchaser.—Agency.—Liability for non-fulfilment of contract.*

*An estate having been purchased by A., who was unable to pay the purchase-money, B. agreed to do so for him on condition that he should receive the purchase-money when it was*



*resold. B. resold the estate to C., who gave three promissory notes for the purchase-money, which he paid. A. subsequently became bankrupt before transfer of the estate was given to C., and the estate consequently fell to A.'s trustee. C. had notice of the critical state of A.'s affairs, and might have obtained transfer of the estate. In an action by C. against B. for the return of the money paid in respect of the notes—*

*Held, that under the circumstances C. could not recover the money back.*

1862.  
Sept. 23.

Venter vs.  
Green and  
another.

Action to recover the value of three promissory notes.

*Denyssen, Barry, and Watermeyer, were for the plaintiff. Brand, and Cole, were for the defendant.*

The facts sufficiently appear from the judgment of the Court.

*Cur. adv. vult.*

1862.  
Dec. 9.

**THE CHIEF JUSTICE :—**The question to be determined was whether the amount of the purchase-money of an estate sold by Dawson, who had become insolvent, to Venter who paid the purchase-money, but did not get the transfer, could be recovered back by the plaintiff from Green, the agent of Dawson who sold the estate. It appears to me after considering the evidence, that the judgment of the Court must be in favour of the defendant. It is certainly a case in which the plaintiff has suffered a very considerable loss by reason of his not having received transfer of an estate which he had paid for before the insolvency of the seller Dawson, but I think that when the case is examined it will be considered to be a much greater hardship for Green to be compelled to refund the money and to become a concurrent creditor on the insolvent estate of Dawson.

It appears that Dawson had originally purchased from Botha, and that Green had become surety to Botha for the payment of the purchase-money which enabled Dawson to get transfer and again to take it into the market, and all this was communicated to Venter in the course of the negotiations which took place. Green appears to have been anxious to

realize the money which he had become surety for to Dawson, and he issued an advertisement that the estate was for sale, without putting Dawson's name at all in the advertisement. It is quite clear that he assumed, as the agent of Dawson, to have full power to sell the property, and the plaintiff being anxious to purchase, requested a relative to go to Mr. Green and ascertain the price, and after some negotiations, the parties agreed that the estate should be sold to Venter for £1600. A proper document was drawn up by which Dawson sold and Venter agreed to purchase for that sum.

The terms of payment stipulated were that Dawson should hand over to Venter a mortgage for £400, existing upon the security of the estate, that one payment of £550 should be made six months after the date of the contract, which was the 13th July, 1860. A second payment of £325 nine months afterwards, and a third sum of £325 at the end of a year. There was a clause in the contract, that as soon as these payments were made transfer should be given of the estate. So far all was concluded satisfactorily, and Dawson sent to an agent named Watermeyer, at Hanover, a full power of attorney to give transfer. Watermeyer had therefore full power to give transfer as soon as he was informed that all was right. The contract of sale was signed by Dawson, not by Green. Venter, on communication with Watermeyer, and finding that the first instalment of £550 was become due in January, went to Green to get further time allowed in which to pay the amount, and it was agreed between them that the amount should be paid at eight months instead of six. It appears to me that Green did not agree to that arrangement altogether as the agent of Dawson, but upon a full statement of all the circumstances. He says he told Venter that he was responsible to Botha for the balance of the purchase-money of the estate which was payable in March, and that therefore he could not allow Venter more than two months longer time in which to pay the first instalment. Venter thereupon handed over to Green promissory notes payable to Green, not to Dawson, for the first instalment at eight months, the second at nine months, and the third at twelve months after the date of the contract.

1862.  
Sept. 23.  
Dec. 9.

Venter vs.  
Green and  
another.

1862.  
Sept. 23.  
Dec. 8.

Venter vs.  
Green and  
another.

The only thing likely to make Green responsible in the matter is a statement by Venter, not contradicted by Green, that in the event of Venter giving the notes, there would be no difficulty about the transfer. And probably Green was quite right in making the statement, for on the very next day he wrote Watermeyer informing him that arrangements had been made for the payment of the purchase-money, and that he might give transfer. But it is quite evident that Venter wished to avail himself of the full six months he was allowed by law for the payment of the transfer; and Watermeyer having heard that he did so, and having some suspicion respecting the state of Dawson's affairs, gave Venter a hint which, however, he did not take. Subsequently having heard that Dawson was in very bad circumstances, Watermeyer communicated the fact to Venter, who, becoming alarmed, gave him the money for the transfer dues. The money was paid in Colesberg, on the 29th December, more than five months after the date of the contract, but before it arrived in Cape Town and transfer could be made, Dawson surrendered his estate. These being the facts, it appears to me that Green is not to blame, but that Venter is very much to blame for having allowed so much time to elapse before he paid the transfer dues. Everything was in the hands of Watermeyer which was necessary to enable him to give transfer, if Venter would have paid the transfer dues earlier; and were we now to decide that Green must repay the purchase-money to Venter he would be made to suffer in a transaction in which he is not in fault. I think it more just that Venter should come as a concurrent creditor upon the estate of Dawson, than that Green should be obliged to do so. The principle laid down in *Buissinne's* case is clear and distinct, and it would be a very unwise thing to shake the authority of that decision in the slightest degree. I think the difficulty arose in consequence of the desire of Venter to avoid paying the transfer dues as long as possible, and if men will run such risks they must take the consequence.

WATERMEYER, J., concurred.

THE NAMAQUA MINING COMPANY *vs.* THE COMMERCIAL  
MARINE INSURANCE COMPANY.

*Insurance.—Apportionment.—Interpretation of judgment of  
Privy Council.*

*The Court will interpret a judgment of the Privy Council  
according to its general intention, and will not allow any  
technical advantage to be taken of an ambiguous ex-  
pression.*

Application to determine the construction of a judgment  
of the Judicial Committee of the Privy Council, partially  
reversing a judgment of the Supreme Court.

The plaintiffs, on the 27th November, 1857, had effected  
an insurance with the defendants to the value of £4000 on  
copper ore, valued at £25 per ton, per *Admiral Collingwood*,  
at and from anchorage off Hondeklip Bay and Port Nolloth  
to Swansea; 154 tons were shipped at Hondeklip Bay  
and 250 tons at Port Nolloth, both of which quantities  
were totally lost. The plaintiffs then brought an action  
against the defendants, claiming £4000. At the trial, the  
plea of unseaworthiness, on which the defendants relied,  
was not proved, and judgment was given against them. On  
appeal, the Privy Council confirmed that judgment as to  
the 154 tons, but reversed it as to the 250 tons shipped at  
Port Nolloth, on the ground that the ship was unseaworthy  
when it left the latter port. The plaintiffs now claimed  
that under this judgment they were entitled to recover  
£3850 from the defendants, the full value of 154 tons at  
£25 per ton. It appeared that other insurances, in all  
amounting to £10,000, had been effected by the plaintiffs,  
and that two other companies had already paid £6000 in  
respect of the losses sustained. The defendants had tendered  
£1540 and interest, being two-fifths of the value of 154  
tons, and alleged that this amount covered their liability,  
inasmuch as they originally undertook two-fifths of the  
insurance, and the Privy Council had found that the plaintiffs

1862.  
Nov. 11.  
—  
The Namaqua  
Mining  
Company *vs.*  
The Commercial  
Marine  
Insurance  
Company.

1862.  
Nov. 11.  
—  
The Namaqua  
Mining  
Company vs.  
The Commercial  
Marine  
Insurance  
Company.

were not entitled to recover on the whole 404 tons shipped, but only on 154.

*Denysen*, for the plaintiffs, argued that this was not a case of double insurance. The Privy Council had virtually decided that there were two risks, one from Hondeklip Bay and the other from Port Nolloth. The other insurance offices had paid £6000, but had not requested it to be appropriated to any particular portion of the risk incurred; therefore the plaintiffs were entitled to apply it to the risk from Port Nolloth and upon the 250 tons of copper ore shipped at that port. In support of this appropriation he cited *Philpot vs. Jones (a)*. He admitted that his clients had been paid £6000 by the other companies on an account for which the Privy Council would not have given 6d., but maintained that he was still entitled to devote that sum to any particular purpose. The judgment of the Privy Council gave his clients the value of 154 tons at £25 per ton; and with that judgment in their favour against the present defendants they ought to have the full value of the 154 tons. The plaintiffs were bound by the issues raised at the trial, and could not now set up that their liability was only partial, and that the plaintiffs ought to receive only two-fifths of the value of the 154 tons. The total insurance was for £10,000, and as the defendants had not set up the plea that other companies were liable to pay their share, they could not now set it up after a judgment on appeal.

*Watermeyer*, for the defendants, urged that the plaintiffs' contention reduced the decision of the Privy Council to an absurdity. The Judicial Committee had had before it a judgment of the Supreme Court, awarding the plaintiffs £4000 against the present defendants. That was in respect of the whole risk; but their Lordships had found that the plaintiffs were only entitled to recover on the 154 tons shipped at Hondeklip Bay. Now, suppose 160 tons had been shipped at Hondeklip Bay, and 244 tons at Port Nolloth; then, as 160 tons at £25 per ton would amount to £4000, according to the plaintiffs' version, the judgment of

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(a) 2 Q. B. 41.

the Privy Council, which would be identically the same as it now is, would stand: "We confirm the judgment for £4000 as to £4000; we reverse it as to the residue, which is nothing." This showed the fallacy in the plaintiffs' interpretation, because, under slightly altered circumstances, there would have been no residue as to which the reversal would apply. It must, therefore, be clear that the Judicial Committee had in their minds the fact of the other insurances effected by the plaintiffs, and their meaning was that they should receive the proportion of £4000 which belonged to the 154 tons shipped at Hondeklip Bay; otherwise it would have been useless to reverse the judgment as regarded the quantity shipped at Port Nolloth. The true interpretation was that the defendant company was liable to the extent of the proportion of 154 to 404 tons, and that was the amount which they had originally tendered. It might have been more prudent to have pleaded in the first instance the fact of there being other insurances; but to insist upon its necessity was to attempt to take unreasonable advantage of a mere technicality.

1882.  
Nov. 11.  
The Namaqua  
Mining  
Company vs.  
The Commercial  
Marine  
Insurance  
Company.

**THE CHIEF JUSTICE:**—It appears to me that the defendants have tendered the correct sum. Our original judgment was for £4000 in respect of the quantities of ore. This is affirmed as to 154 tons and reversed as to the remainder; and the rateable proportion of £4000, for which the whole 404 tons were insured, is £1540, the amount tendered. If it is said that the defendants did not raise this issue upon the pleadings, the answer is that the Privy Council thought fit to treat it as so raised, and we are bound by their decision. *Mr. Watermeyer's* remark that if six tons more had been shipped at Hondeklip, the plaintiffs would, on their contention, be entitled to the whole £4000, shows the absurdity of the interpretation which the plaintiffs seek to put upon this judgment.

**CLOETE, J.,** concurred in the judgment of **THE CHIEF JUSTICE**, and pointed out that the Privy Council, by severing the two quantities of ore shipped, obviously intended that there should be a *pro rata* distribution of the loss in

1862.  
Nov. 11.  
—  
The Namaqua  
Mining  
Company vs.  
The Commercial  
Marine  
Insurance  
Company.

respect of the 154 tons and the 250 tons. Any other conclusion would virtually give the plaintiffs the benefit of that part of their judgment which was reversed.

**WATERMEYER, J.**:—I agree. The plaintiffs have been fortunate enough to get £6000 from the other companies; whereas had they also resisted payment, the plaintiffs would only have got £4000 in all. It is quite clear that the Privy Council had in their minds the evidence relating to the other insurances, and that the risks taken by all three companies were precisely the same. Therefore the £4000 undertaking by the Commercial Marine Company was £4000 upon what was shipped at Hondeklip Bay and at Port Nolloth. The remarkably ingenious interpretation of the judgment put forward by the plaintiffs would entitle them to recover nearly the whole of the £10,000 for which they were insured. As it is they have got much more than they could legally have recovered.

*Watermeyer* asked for the costs of the day, but the Court decided that each party should pay their own costs, as it was necessary for the Registrar to have instructions as to the amount for which the verdict was to be entered.




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*Re A. A. BATHGATE.*

*Lunatic. — Discharge of curators. — Report as to health by curator of person.*

1862.  
Nov. 16.  
Dec. 4.  
—  
*Re A. A. Bath-*  
*gate.*

Motion for the discharge of an order of the Supreme Court whereby Messrs. Darnell and Swemmer were appointed curators of the estate of A. A. Bathgate, who had been declared a lunatic.

*The Acting Attorney-General* appeared in support of the motion.

*Brand*, and *Watermeyer*, for the curators.

Dr. Laing and Dr. Dyer deposed that A. A. Bathgate was now of sound mind.

1862.  
Nov. 15.  
Dec. 4.

THE COURT adjourned the case in order to examine A. A. Bathgate in private. *Re A. A. Bathgate.*

THE COURT stated that having examined A. A. Bathgate, and having regard to the evidence of the medical gentlemen, they were satisfied A. A. Bathgate was capable of managing his own affairs, and discharged the order of the Court. The Court also ordered that Mr. Darnell, the curator of the person of A. A. Bathgate, should make a report every six months to the Court as to his health. If from absence he was unable so to do, then this duty to be performed by some person to be named by A. A. Bathgate.

### STURE vs. STURE.

*Restraining husband from parting with joint property of himself and wife.—Rule nisi as interdict.*

Motion on behalf of Margaret Sture for a rule *nisi* calling on her husband James Sture to show cause why he should not be restrained from making away with the property of the community until she had sued for a judicial separation. The applicant stated on affidavit that her husband had turned her out of doors on August 26th, and that he had not contributed to her support since that date.

1862.  
Nov. 15.  
Sture vs. Sture.

On the morning of this day (Saturday) the respondent had placed the greater part of the joint furniture of the applicant and himself upon the parade for sale, by one Cauvin.

*Watermeyer*, for the motion.

THE COURT granted a rule *nisi*, returnable on the next Tuesday, which should in the meantime act as an interdict.



*In re HULLEY, an Insolvent.**Insolvency.—Fraudulent account by insolvent as executor.—  
Procedure.*

*When a fraudulent account has been filed by an executor, the Court will appoint a curator ad litem for minors interested in the fund, with a view to avoid expense by acting on his report.*

1882.  
Nov. 20.  
*In re Hulley,  
an Insolvent.*

Motion for a rule calling on the insolvent to show cause why a fictitious account of the estate of himself and his deceased wife, signed by him as executor-dative, and filed with the Master of the Supreme Court, should not be set aside. The insolvent had produced a fictitious account after his wife's death, purporting to represent the shares of his wife and himself in their joint estate, and had paid £174 to the Master, as the share of each of his children. He had since acknowledged on oath that this account was a fraud upon his creditors, and that his children, who were minors, were not entitled to any sum at all.

*Denyssen*, for the motion.

THE COURT in order to expedite the inquiry, and to avoid expense, appointed a curator *ad litem* for the minors, the children, with instructions to him to report to the Court whether the account could stand in equity. Rule granted, and action to be brought against the insolvent and the curator *ad litem* if necessary.

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STEWART & CO. *vs.* EXECUTORS OF STANES.*Defective building.—Lessor and lessee.—Liability.*

*When a lessor let a building for the purpose of a store, and it was so badly constructed that a floor fell in and damaged the lessee's goods: Held, that the plaintiff (the lessee) was entitled to recover damages from the lessor.*

Appeal against a decision of The Chief Justice, by which he gave judgment for the defendants.

The plaintiffs hired from the defendants certain stores in Port Elizabeth, for the purpose of their business as general dealers. Three months after these stores were so hired the upper floor gave way, damaging the plaintiffs goods to the amount of £250. The plaintiffs therefore brought an action against the defendants, on the ground that the store was not constructed in a reasonably good and sufficient manner for the keeping of goods "in such reasonable and ordinary quantities, and of such reasonable and ordinary weight, as traders and dealers like the plaintiffs are accustomed to keep in their stores." The defendants pleaded the general issue, and that the loss was caused by the plaintiffs keeping an unreasonable quantity and weight of goods on this floor. The evidence taken at the trial showed that the construction of the store was faulty, but that this would not be apparent to an unprofessional person.

1862.  
Nov. 25.  
—  
Stewart & Co.  
*vs.* Executors  
of Stanes.

*Denyssen*, for the plaintiffs, argued that the judgment was wrong. There was an implied warranty by the persons who let the store that it was fit for the purpose for which it was hired. He referred to *Van der Linden*.

*Watermeyer*, for the defendants, argued that there was no implied warranty in such a case as this, and that a lessor was only liable for damages when he knowingly let a building with defects of which the lessee was ignorant. He referred to *Voet*, 19, 2, 14.

*Cur. adv. vult.*

1862.  
Nov. 25.  
—  
Stewart & Co.  
vs. Executors  
of Stanes.

THE COURT (BELL, J., CLOETE, J., and WATERMEYER, J.) held, that the plaintiff was entitled to recover, as a defect in the building was clearly the cause of the loss to the plaintiffs.

THE CHIEF JUSTICE dissented.

Judgment reversed.

*In re P. J. GREEF, an Insolvent.*

*Rehabilitation.—Books.—Suspension.*

1862.  
Nov. 27.  
—  
In re P. J.  
Greef, an  
Insolvent.

Application for the rehabilitation of the insolvent.

*Watermeyer*, in support of the application.

THE COURT made the order, but directed the rehabilitation to be suspended for three months in consequence of the insolvent not having kept any books.

EXECUTORS OF WICHT vs. WICHT.

*Ante-nuptial contract.—Will of married woman.—Costs.*

*A married woman made a will, and the executors claimed an account from her husband, who set up an ante-nuptial contract. The Court held the contract to be valid.*

The facts of this case sufficiently appear from the judgment.

*Denyssen and Brand*, for the plaintiffs.

*Watermeyer*, for the defendants.

1862.  
Dec. 4.  
—  
Executors of  
Wicht vs.  
Wicht.

THE CHIEF JUSTICE: The declaration alleged that Mrs. Wicht had been married to the defendant in community of property, and by her will had disposed of her half of the joint estate to which letters of administration had been taken

out by the plaintiffs, who therefore claimed from the defendant an account of the joint estate in order to distribute it according to the will. The defendant set up an ante-nuptial contract between himself and his late wife, and alleged that they were married without community of property. The reply denied the execution of the contract, and alleged that if executed by the testatrix, it was not signed by her with a knowledge of its purport. The law applicable to the case is free from difficulty. The parties were married (1844) at a time when the Roman-Dutch law prevailed at Natal, where the ceremony took place, and community of goods between married people existed. The real question turns upon the validity of the ante-nuptial contract, and as to that I have not the slightest doubt. Even without the positive testimony of the defendant, its validity would have been clearly established. Other witnesses supplied reasons which made such a contract extremely probable. One independent witness had sworn that the defendant refused to marry without that contract. His wife's affairs were seriously embarrassed before the marriage, and on that account it was reasonable that he should insist on its being made. The signature of Mrs. Wicht is undoubtedly genuine as compared with other specimens of her handwriting, and the charge that it was a fabrication entirely failed. If the relatives of the deceased had informed the defendant of the existence of this will previously to bringing this action, he would probably have produced the contract, and the litigation would have been avoided. There are circumstances, however, in the defendant's conduct, his anxiety that Mrs. Wicht should make a will, his destroying a document after notice to produce it had been given to him, and his delay in producing the ante-nuptial contract, which were calculated to lead the plaintiffs to suppose that Mr. and Mrs. Wicht were married in community of property. For these reasons the Court is of opinion that, though the defendant was entitled to judgment, he should pay his own costs. The separate estate of Mrs. Wicht will bear the costs of the plaintiffs.

1862.  
Dec. 4.  
—  
Executors of  
Wicht vs.  
Wicht.

CLOETE and WATERMEYER, JJ., concurred.

BLACKBURN *vs.* MEINTJES.*Insolvent firm.—Liability of partners.*

*Provisional judgment against the private estate of a partner will be granted in respect of a debt due from a firm which has become insolvent.*

1862.  
Dec. 4.

Blackburn *vs.*  
Meintjes.

## Application for provisional judgment.

The plaintiff, as holder of a promissory note, made by the insolvent firm Meintjes & Dixon, applied for provisional judgment against the private estate of Meintjes.

The *Acting Attorney-General*, for the motion, relied on the case of *Hudson v. Eagar & Pyhis* (Aug. 9, 1855), in which judgment on a note similarly made by Horne, Eagar & Co. was given against the private estates of two of the partners.

THE COURT gave judgment as prayed.

RUYTENBEEK *vs.* RUYTENBEEK.*Divorce.—Non-appearance.*

1862.  
Dec. 12.

Ruytenbeek *vs.*  
Ruytenbeek.

Action for decree of divorce by the plaintiff against his wife on the ground of desertion. The defendant, who was at the time in Batavia, had been cited, and an appearance had been entered, but the defendant did not appear at the trial either in person or by an advocate.

The *Acting Attorney-General* appeared for the plaintiff.

THE COURT decreed a divorce.

*In re W. GLOVER, an Insolvent.*

*Rehabilitation.—Suspension.*

Motion for the rehabilitation of the Insolvent.

1862.  
Dec. 13.  
*In re W. Glover,  
an Insolvent.*

*Watermeyer*, for the applicant.

It appeared that the insolvent had gone to a sale, and whilst intoxicated had purchased property for double its value, whereby his insolvency was caused.

THE COURT held that the rehabilitation must be suspended for three months.

FLETCHER v. BLACKBURN.

*Provisional sentence.—Guarantee.—Evidence.*

*Provisional sentence refused on a guarantee in respect of which evidence was required.*

Application for a provisional judgment against J. Blackburn for payment of £200 due on a guarantee given to the plaintiffs in respect of their claim against one Bruce. The guarantee was to the effect that Bruce being indebted to the plaintiff to the amount of about £200, the defendant in consideration of a commission of 10 per cent. guaranteed the due payment of the debt within twelve months, "it being also understood that in the event of the death of the said Bruce before the expiration of twelve months that I shall be relieved from all responsibility."

1862.  
Dec. 20.  
*Fletcher vs.  
Blackburn.*

*The Acting Attorney-General* was for the plaintiffs.

*Watermeyer*, for the defendant, submitted that the guarantee in question could not be subject of a provisional judgment; evidence was required as to the sum due and the existence

1862.  
Dec. 20.  
Fletcher vs.  
Blackburn.

of Bruce and evidence was inadmissible in a provisional proceeding.

THE COURT held that the document in question was not one on which a provisional sentence could be obtained.

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NEETHLING v. MUNICIPALITY OF STELLENBOSCH.

*Interdict.—Title.*

*In the case of a disputed right to land an interdict was refused.*

1862.  
Dec. 23.  
Neethling vs.  
Municipality of  
Stellenbosch.

Application for an interdict to prevent the respondents from giving a title to a certain piece of ground.

It appeared that in April, 1846, the Colonial Government caused a certain piece of land to be sold, which was purchased by one Van Ryneveld, who afterwards disposed of it in lots, one of which the applicant purchased. Certain persons had recently agreed to buy some adjoining land from the Municipality, and the applicant maintained that a part of such land belonged to him. The respondents filed an affidavit in reply.

*Watermeyer*, for the applicant.

*The Attorney-General* for the respondent.

THE COURT refused to grant an interdict, and said that if the applicant thought his title strong enough he must commence a declaratory action. The application must be refused, with costs.

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## IN THE GOODS OF VAN ROOYEN.

*Will.—Memorandum.—Revocation of ante-nuptial contract.—  
Act No. 15, 1845.*

*An unsigned note was held not to affect the validity of a signed will, and letters of administration were issued.—The question of the revocation of ante-nuptial contract to be mentioned again to the Court.*

Motion on behalf of the executors of J. H. Van Rooyen deceased, for a declaration that a paper writing which purported to be the last will and testament of the said J. H. Van Rooyen was the last will and testament of the deceased. J. H. Van Rooyen, and his wife, who survived him, made a joint will, at the foot of which was a note stating that at the testator's request the will had been signed by another person for him, but in his presence and in that of the attesting witnesses. The Master, in consequence of this note, felt a difficulty about granting letters of administration. The signature, however, appeared to be in accordance with Ordinance No. 15 of 1845, which directed that a will must be signed either by the testator or by some other person in his presence and by his direction.

1862.  
Dec. 30.  
In the Goods of  
Van Rooyen.

The Master also stated that there was another difficulty in regard to this will, since it professed to revoke an ante-nuptial contract, which was contrary to the law. It appeared that the only guardian of the children, who were minors, appointed by the will was the mother, who by the revocation by this will of an ante-nuptial contract was benefited to the prejudice of the children. Therefore, if letters of administration were to issue, nothing more would be heard of the matter, and the interests of the children would be prejudiced.

*Watermeyer*, in support of the motion.

BELL, J.:—The note in question must be treated as being invalid, and letters of administration must issue in the ordinary form. The other circumstances must be brought again before the Court.



1862.  
Dec. 30.  
In the Goods of  
Van Rooyen.

WATERMEYER, J. :—If the note had been signed it would have been quite regular; if the note were not in existence the signature would be taken to be the proper signature of the testator, and the note not being signed it must be considered as non-existent, and the signature of the will valid.

CLOETE, J., was of the same opinion.

# GARDNER vs. COLEMAN.

## *Provisional sentence.—Failure of consideration.*

1862.  
Dec. 30.  
Gardner vs.  
Coleman.

Application for a provisional sentence on a bill for £150 drawn by W. E. Knight and endorsed by the defendant to the plaintiff. It appeared that the plaintiff was the owner of a farm leased to one Ulitt, who was in arrear for two years' rent, amounting to £150. Knight was desirous of taking over the lease if he was put into possession of the farm, and, on the faith of this being done, Knight drew a bill, which was accepted by Coleman. Knight, however, died before obtaining possession of the farm, Ulitt remaining on it.

*Watermeyer*, for the motion.  
*The Attorney-General*, contra.

THE COURT refused to decree provisional sentence, and ordered the plaintiff to declare in the action.

*In re JOHANNES DE WET, an Insolvent.*

*Provisional trustee.—Appointment.—Creditor.*

*A large creditor was appointed a provisional trustee.*

Motion for appointment of a provisional trustee of the estate of the above-named insolvent.

1882.  
Dec. 30.

*In re Johannes  
de Wet, of  
Pearston, an  
insolvent*

*The Acting Attorney-General* moved for the appointment of Robert Henry Black, on an affidavit of Charles William Packenham, of the firm of Black & Co., of Port Elizabeth, the principal creditors of the insolvent. This affidavit set forth that the insolvent was indebted to Black & Co. to the extent of £5293, that a portion of his stock consisted of perishable articles, that he had been sending some away from Pearston to Uitenhage, and that Black & Co. believed that it was necessary that a provisional trustee should be appointed. The insolvent had lately removed from Pearston, where he had carried on business, to Somerset East.

BELL, J., said that complaints had been made as to the appointment of large creditors as trustees of insolvent estates, on the ground that they sometimes protected themselves at the expense of smaller creditors. But the appointment of a trustee simply to protect the estate was essentially different from that of one to realize it, and he accordingly appointed Mr. Black as provisional trustee.

*BARRY vs. MILLER.*

*Summary ejectment.—Uncertificated Insolvent.—Power to deal with Property.*

*An uncertificated insolvent who has surrendered his estate, and thereby forfeited his tenancy of premises, cannot make a valid agreement to continue the same tenancy.*

A rule had been granted to the plaintiff calling upon the defendant to show cause why he should not be interdicted from receiving the rents of certain premises sublet by him

1883.  
Jan. 13.

*Barry vs. Miller.*

1863.  
Jan. 13.  
Barry vs. Miller.

to tenants, and why he should not be summarily ejected from the same. The plaintiff had let the said premises in January, 1861, to the defendant for a term of two years expiring December 31, 1862, with power to the defendant to re-hire the premises at the expiration of his tenancy. In the course of 1861, the defendant surrendered his estate as insolvent, and the tenancy was thereby determined. Barry, however, allowed him to remain in possession on the express condition that he should vacate the premises at the end of 1862, and had let them to another tenant from January 1, 1863; but the defendant refused to give up possession, and swore that the condition on which he had been allowed to remain was the same as that contained in the original lease, namely that he should have the right of a renewal of the lease after December 31, 1862.

*Barry*, showed cause.

THE COURT, after intimating that as regarded the conflict of testimony they believed the plaintiff's version, held as matter of law that an uncertificated insolvent could not acquire such a right as was now claimed by the defendant, and ordered him to give up possession of the premises within three days, and to pay the costs of the application.

#### EXECUTORS OF SMITH vs. GALPIN.

*Specific performance.—Variance in deed tendered by defendant after judgment for plaintiff.—Contempt of Court.*

*An attachment will issue against a party to a suit neglecting to comply with an order of the Court for specific performance of a contract.*

1863.  
Jan. 6.  
Executors of  
Smith vs.  
Galpin.

Motion for an order to restrain the plaintiff's agent from paying over to the plaintiff certain purchase-moneys now in his hands, on the ground that the defendant, having been

ordered by a judgment at the Circuit Court at Graham's Town to complete the purchase of certain property, and having complied with this order, had received from the plaintiffs a transfer materially different from that ordered by the Court, and showing in the diagram other boundaries of the land to be transferred than were in the deed that was produced in Court at the trial.

1863.  
Jan. 6.  
—  
Executors of  
Smith vs.  
Galpin.

*Watermeyer*, for the motion.

BELL, J.:—This is a fraud upon my judgment. But the agent is not a party to the proceedings, and we can make no order against him; your proper motion is for an attachment against the plaintiffs for contempt of Court in not complying with the judgment of the Court. Take a rule *nisi* to show cause why they should not be attached. You can give private notice to the agent not to part with the money.

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*In re COWEN, an Insolvent.*

*Insolvency.—Provisional Trustee.—Onerous Rent.*

*A provisional trustee will be appointed for the purpose of disclaiming an onerous tenancy that has belonged to the insolvent.*

Motion for the appointment of a provisional trustee of this insolvent's estate, on the ground that there were expensive premises leased to the defendant, which it was desirable to give up as soon as possible in order to relieve the estate from the burden of paying rent. The motion was supported by creditors to the value of £2000, out of a total of £2600.

1863.  
Jan. 6.  
—  
*In re Cowen,  
an Insolvent.*

*The Attorney-General*, for the motion. .

THE COURT made the appointment as prayed.

## JONES v. RANDLE.

*Collision.—Harbour Master.—Act No. 16, 1857.*

*A vessel was moored in Simon's Bay near the B., under the order of the harbour master, in such a position that a collision occurred.*

*Held, that the master of the B. could recover damages against the master of the A. (a).*

*Semble, the master of a vessel is not bound to follow the direction of the harbour master if he thinks that they will cause damage to be done to his ship.*

1862.  
Dec. 19.  
1863.  
Feb. 19.  
—  
JONES vs.  
Randle.

Action for damages by collision.

*Denyssen* appeared for the plaintiff.

*Watermeyer*, for the defendants.

The facts sufficiently appear from the judgment of the Court.

*Cur. adv. vult.*

THE CHIEF JUSTICE: This case was argued at the end of last term. It was an action brought by the master of the bark *Maitland*, moored in Simon's Bay, against the master of the steamship *Golden Fleece*, also lying at anchor in Simon's Bay, for damages caused by a collision in which the *Golden Fleece* inflicted certain damages upon the *Maitland*. It appeared that the bark *Maitland* had been moored in Simon's Bay under the direction of the port captain, and was lying there when the *Golden Fleece* made her appearance off the harbour in a very distressed state, having lost her masts in a storm. She was boarded by the port captain,

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(a) See the *Bilbao*, Lushington, 149.

who, as is usual in such cases, handed to Captain Randle a copy of the instructions for masters of vessels entering the port, founded upon the Act of Parliament. And there is no doubt that the port captain, by his coxswain, who was left on deck while the port captain went below, ordered the vessel to be moored in a particular place very near to the *Maitland*. Captain Randle states that he observed that the ship was brought very near to the *Maitland*, and also to another ship, and that he remonstrated with the coxswain, and also spoke to the port captain on the subject when he came on deck, but was assured that everything was right and proper, and considering that he was doing right in following the directions of the port captain, he did not press the point further. Captain Randle was obliged to leave the vessel before the mooring was completed for the purpose of coming to Cape Town to communicate with the agents of the vessel, and it appears to me that he must be exonerated from any negligence. I cannot find that he acted otherwise than as an extremely careful captain would have acted under such circumstances. A short time after the mooring had been completed, a sudden wind sprung up which caused this large vessel of 300 feet in length to swing round, and although the people on board the *Maitland* did all they could by paying out cable to avoid a collision, the *Golden Fleece* struck the *Maitland*, and inflicted upon her certain damages. The question is whether the defendant is entitled to set up the plea which he put upon the record, that the vessel was in the charge of the harbour master of the bay, who gave instructions for her to take up that particular berth. Although at first I had some doubt upon the question, upon looking at the authorities cited during the argument and some others which I have found, in both American and our own books, it seems to me that the circumstances of this case do not entitle the defendant to set up this plea. The first remark to be made is that the Act No. 16, 1857, which gives authority to the harbour master in Simon's Bay to board vessels for the purpose of having them safely moored, does not give any authority to the harbour master to take the control of the vessel, as is the case when, under the English Merchant Shipping Act,

1862.  
Dec. 19.  
1863.  
Feb. 19.  
—  
Jones vs.  
Randle.

1862.  
Dec. 19.  
1863.  
Feb. 19.

—  
Jones vs.  
Randle.

pilots are placed in charge of vessels. There are several sections which seem to show that the harbour master may point out to the captain of a vessel a place where the vessel may be moored, and after having once moored his vessel, a captain is not at liberty to remove from that mooring without the knowledge and consent of the port captain, under certain penalties which may be enforced. The 21st, 22nd, and 23rd sections of the Act under which authority is given to the harbour master, appear to me to fall short of the authority given to pilots under the Merchant Shipping Act, which expressly places ships under their control, and makes the master no longer responsible for any accident which may happen whilst the ship is under the care of the pilot. One of the witnesses who was examined, a captain of a ship, laid down very clearly the principle upon which captains should act when the harbour master goes on board their vessels. He says: "I consider I am bound to obey the instructions of the port captain so far as I think it is safe for my ship to do so." Under these circumstances a captain cannot release himself from responsibility in an action of this sort merely by showing the directions of the harbour master in mooring the vessel, if by reason of her not being properly moored accidents arise. It appears to me that the remedy Captain Randle will have will be, if at all, by bringing an action against the harbour master for having put him into the berth where the accident happened. I wish to be understood as confining my remarks entirely to the case before the Court. If a vessel is put in charge of a pilot he has sole control of the navigation of the ship, and neither the masters nor the owners would be liable in case of accident where there was no negligence whatever on the part of the crew of the vessel causing the damage. But as I have already said, the Act of Parliament falls very far short of conferring any such authority as that upon the harbour masters of this Colony. When they board ships they merely point out where the vessels ought to be moored, and the captains must at their own risk adopt or reject their advice. I think a person who has control to such an extent as a master of a ship may, if he please, refuse to follow their advice, if he thinks that by following it damage will be in-

flicted upon his ship. If Captain Randle had taken that course, there is no doubt that his vessel would not have caused any damage. He says that he considered his vessel too close to the *Maitland*, and also to another vessel, and that he appealed in the first instance to the coxswain, and afterwards to the harbour master, but unfortunately did not take upon himself the authority which he might have exercised of insisting that the vessel should not be placed there. He might have taken his ship out of the bay again, and have referred the matter to the higher authorities on shore. Under all the circumstances, Captain Randle having taken command of the vessel under very trying circumstances, no blame can be attached to him in the matter. But he did not quite understand the effect of the Act of Parliament and the instructions given to him; and he in the first instance must be held responsible to the plaintiff for the damage which was done to the *Maitland*. The extent of the damage was not very clearly proved by the witnesses. It appears to me, and I believe the rest of the Court concur, that if we award £60, it will sufficiently meet the circumstances of the case, and will be something more than the amount of the half of the damage claimed, which in the first instance was tendered, and which would have been the proper measure of the damage, provided there had been no fault on either side. There must be a verdict for the plaintiff for £60, with costs.

1862.  
Dec. 19.  
1863.  
Feb. 19.  
—  
Jones vs.  
Randle.

CLOETE, J.:—I think it quite unnecessary to refer to the authorities which establish the principles upon which damages are to be awarded in cases of collision. All these were fully before us, in August, 1857, when the case of the Bremen bark *Norma* was brought before the Court, and which case has been fully reported by my brother Watermeyer in the first number of his *Reported Cases*. There is laid down the undoubted law that in cases of collision in which no blame attaches to either ship, the amounts of the damage done to both are to be added together, and each bear an equal portion; but if the injury is caused by the fault of one, that one must bear the whole. The first point we had to decide in this case was, whether



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—  
Jones vs.  
Randle.

there was any possible pretence for holding that any blame attached to the *Maitland*. The evidence was in that respect perfectly conclusive, and did not bear out what the special plea seems to attribute, that there was some fault on the part of the *Maitland* which entitled the plaintiff to tender only half the amount of the damage which had been sustained. The evidence conclusively proved that the *Maitland* had been for some time at anchor, lying perfectly safe with several other vessels around her at proper distances from each other, when the *Golden Fleece* arrived in an utterly disabled state; and when the harbour master in the excitement of the moment, anxious to do the best he could under the circumstances, brought that very large vessel of 2,800 tons, and upwards of 300 feet in length, within all the other vessels in order to facilitate communication with the shore, and the execution of the necessary repairs, in that he committed an error of judgment. In the opinion of Captain Hoets and several other competent persons, it was a berth which ought not to have been taken by a vessel of that kind, for it was physically impossible that when the wind veered to the northward, she could avoid coming into collision with the *Maitland* on the one hand and the *Clara Wheeler* on the other. And the event proved the opinion to be a correct one. The vessel was hardly moored, when the wind came round to the northward; she swung round, overlapping the *Maitland* 40 or 50 feet, and would have inflicted serious damage upon her but for the diligence shown on the part of the people on board, in consequence of which she escaped with very slight injuries. It is therefore clear, according to all the principles of law, that no blame could attach to the *Maitland*, and that the *Golden Fleece* is solely responsible for the damage. In the course of the argument it was, however, contended that the fact of the *Golden Fleece* having been placed there under the orders of the harbour master would relieve the captain from all responsibility. In England, where, in consequence of the very dangerous navigation of the coasts, pilots from the Trinity House, holding special licenses, are directed to board a vessel the moment she comes within a certain sounding, and to take charge of the vessel entirely, the officer on the watch being directed merely to

carry out his directions, the captain is entirely *pro tanto functus officio*. But that is not the case in our harbours. All that our port captain has to do on boarding a ship, to ascertain the state of health of the people on board, is simply to point out a place where he would recommend the ships to take up berths. This does not for a moment take away responsibility from the captain of the ship. He receives the advice, and acts upon it so far as it is consistent with his own judgment, but if such advice is obviously inconsistent with the interests of the ship, he will take upon himself the responsibility of acting against the advice of the port captain. But while holding the young officer who then had command of the ship, through the death of the captain, lawfully responsible for the damage that was done, I am happy to state that no blame can be attributed to him in the matter. Under circumstances of peculiar difficulty, he followed the directions of the port captain, who says he ordered the anchor to be let go when he thought the vessel was far enough in the bay. Whether in consequence of the way the vessel had upon her, or any want of judgment on the part of the port captain, he got nearer to the *Maitland* than was intended, it is quite clear the captain of the vessel is free from blame in regard to his own conduct in respect to this unfortunate transaction. Therefore, while holding the vessel liable for the amount of damage sustained, I think it ought to be confined strictly to the amount which has been clearly established. It was stated that about £70 was the amount of damage actually sustained by the vessel, independent of some work which could be done at sea, and I quite agree that a verdict for £60, with costs, will satisfy the justice of the case.

WATERMEYER, J.:—I quite concur in this view of the case. In my opinion the accident resulted from the manner in which the ship was handled by the port authorities.

Judgment for the plaintiff for £60, with costs.

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1862.  
Dec. 19.  
1863.  
Feb. 19.  
—  
Jones vs.  
Randle.

*In re ROBSON, Insolvent.*

*Examination.—Trustee.*

*The Court will not make an order to examine an insolvent until a trustee of the estate has been appointed.*

1863.  
Jan. 8.  
—  
*In re Robson,  
Insolvent.*

Application for an order that the insolvent and one J. Williams and one H. Lovemore might be examined before a Commissioner of the Supreme Court as to certain transactions which had taken place between them. It appeared that no trustee of the estate had yet been appointed.

*The Attorney-General*, for the application.

THE COURT refused to make the order, on the ground the application was premature. It was possible the insolvent might have no estate, and the proper course was that a provisional trustee should be appointed; the application could then if necessary be hereafter renewed.

THE WYNBERG VALLEY RAILWAY COMPANY *vs.* EKSTEEN.

*Arbitration.—Wynberg Railway Company's Act, § 18.—Compensation.*

*When arbitrators ordered that certain work should be done by the company and certain material taken by the person who claimed compensation: Held,—that the arbitrators should have assessed the value of such material, and should have ordered the company to pay a sum for the same, if the person seeking compensation was not satisfied to take the material. The Court referred the award back to the arbitrators to assess the value of the materials.*

1863.  
Jan. 12, 27.  
—  
The Wynberg  
Valley Railway  
Company *vs.*  
Eksteen.

Motion that a rule *nisi* that the award of the arbitrators in the above case be made a rule of court should be made absolute.

*The Attorney-General*, for the company.  
*Watermeyer*, for the respondent.

1863.  
 Jan. 12, 27.  
 The Wynberg  
 Valley Railway  
 Company vs.  
 Ekateen.

The facts of the case sufficiently appear from the judgment of the Court.

*Cur. adv. vult.*

BELL, J.:—The 18th section of the Act under which this question has arisen is in construction inconveniently long, extending to nearly two folio pages in length. It begins with saying that the company “may enter upon, and take possession of such lands” “as may be required for the *construction and maintaining of the railway* ;” then follows a proviso that no brickfield, garden, vineyard, &c. “shall be used for the purpose of *depositing or excavating soil*” without the consent of the owner. This proviso seems to be intended to apply to the word “construction” in the beginning of the clause, and seems to provide, when taken in conjunction with the beginning, that the company may take possession of land besides that on which the railway is to be made and to be “maintained” for the purpose of assisting them in the “construction” of the railway by either depositing on the land so taken earth dug out elsewhere to form a cutting to depress the level, or by excavating from it earth to be deposited elsewhere to raise the level of the railway, in places where the nature of the ground on which the railway is to be placed may render either operation necessary. The proviso is then continued to declare that the land “taken for the railway” shall not exceed thirty feet, and “sufficient additional width” for slopes, drains, fences, stations, and approaches; and that “in doing so” as little damage as possible shall be done to such lands as aforesaid. This part of the proviso seems to enact that no brickfield, &c. shall be used for the purpose of depositing soil upon it, or excavating soil from it, without doing as little damage to the land as possible; and also that in taking land for the formation of the line, with its slopes and approaches, as little damage as possible is to be done to the lands from which that necessary to form these works has been taken. Then follows a further proviso that “the proprietors of the said lands or materials

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so used and carried away, shall be paid the just value by way of recompense for such lands and materials, or for any damage which may be done by reason thereof, and upon payment or satisfaction of such recompense the said land and materials shall be held and taken to be vested " in the railway company. By this part of the section it seems to be enacted, not only that, upon paying the proprietor of any land taken for the formation of the railway, with its slopes, approaches, &c., the just value by way of recompense for such lands shall be paid ; but that the proprietor shall also be paid for " any damage which may be done by reason thereof," *i.e.*, by reason of taking his lands. The remainder of this long section consists of provisions for effecting a settlement between the company and any proprietor with whose lands they may have dealt in any of the ways suggested in the outset of the section who may not agree with them as to the terms of a settlement. On 17th November last the company gave Eksteen notice that they intended " to take possession, under the provisions of the Act, and for the purposes thereof, of a certain piece of land along the centre line of formation of the proposed railway," and " in recompense or satisfaction for the appropriation of this piece of land for the purposes of the railway, and for any damage which may be done by reason thereof," they tendered him the sum of £400 sterling, and requested him to state whether he accepted this sum or would elect to refer to arbitration the amount of recompense or compensation. In the latter case they required him to transmit the name of the person he selected to be his arbitrator, as provided by this 18th section of the Act. The provision of the section to which reference was thus made was that if the company and any proprietor of land were not " able to agree upon the sum to be paid," then the company should serve a notice upon the proprietor, offering " as recompense or compensation whatever sum of money they shall deem sufficient," and requiring him to say whether he is willing to accept it. And " further stating that," in case he shall refuse to accept it, then the company should call upon him to " refer to arbitration the amount of recompense or compensation " to be paid to him. As I observed upon a former occasion, the words " further stating that " destroy

the enactment ; but as they have evidently crept in *per incuriam*, we must read the section as if they were not there. The subsequent part of the section, after saying how the arbitrators are to be appointed, says that a deed of submission is to be prepared "which shall clearly set forth the matter to be determined by the said arbitrators," and they or any two of them shall be authorized to "determine the amount of compensation to be paid as aforesaid, according to what they shall consider fair and reasonable." If the proprietor refuse to go to arbitration, then "the amount of such recompense or compensation" is to be fixed by a jury who are to be sworn "to inquire of and assess such value, hire, or compensation." Here are new words. Up to this point they had been "recompense, or compensation." Now they are "value, hire, or compensation." And in making their inquiry as to these, the jury are to have "regard not only to the value of the property to be purchased or taken, but also to the damage, if any, to be sustained by the owner in consequence thereof or by reason of the severing of the land taken from the other lands of such owner, or otherwise injuriously affecting the property of the owner by the exercise of the powers of this Act." Mr. Eksteen refused to accept the sum tendered by the company. In consequence, a deed of arbitration was prepared and signed by the parties. This instrument recites that as the parties had not been able to agree "as to the sum to be paid by way of recompense, or compensation for the taking possession and for the use" of a certain piece of ground, it had been agreed "to refer the amount of such recompense or compensation" to the arbiters named. The arbitrators, by their award, dated 8th January, signed by two of them, the third refusing to concur, awarded that the company, on taking possession of the piece of ground in question, should pay the sum of £350 sterling, and further that the company shall "at their own costs and charges excavate the brick clay situate within the said piece of ground to an average depth of five feet, and deposit the same near the pug-mill of the said J. W. Eksteen, or some convenient spot to be pointed out by him." It is this direction which is complained of by Eksteen ; but the award continues, "and shall also, at their cost, and charges, fill up and level that

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part of the clay-pit over which the railway is to pass which lies to the south of the said railway, as will appear on the said annexed diagram."

The objection, as I said before, is rested entirely upon the direction for the excavation of the clay, and the putting it down at the pug-mill, and is ingeniously put by Eksteen's counsel in this way. By the 18th section, he contends that the proprietor of the land is to receive the money, and money only, and £350 which the award gives him must be taken to be so much less than he was entitled to, by how much it will cost the company to excavate the clay and lay it down at his pug-mill, and as the arbiters had no right to pay him in clay, the award must be altogether set aside.

The Act, while it authorizes the company to take possession of the lands required by them, says that "in doing so, as little damage as possible shall be done to such lands." If the parties go to arbitration to have the amount of recompense or compensation for taking the land ascertained, it directs the arbiters to ascertain this "according to what they shall consider fair and reasonable." If they go to a jury, then the jury are to have regard, not only to the value of the property to be taken, "but also to the damage, if any, to be sustained by the owner, in consequence thereof, or otherwise injuriously affecting the property of the owner by the exercise of the powers of the Act."

It is no doubt true, as an abstract proposition, that when damages are due by law they are to be awarded in money, as, to use the language of the commentators, "money is the measure of all things" (Domat III. 53; Rolle's Abr. Arb. B. 10, 11; *Hemsworth vs. Brian* (a)), but that proposition may fail in its application according to the particular circumstances of the case to which its application is directed. It would seem also that the particular terms of the Act in this case contemplate that the payment of the recompense or compensation is to be in money, and in nothing else, as to which I do not feel it necessary at present to express any decided opinion. Certainly the offer to be made by the company is of a "sum of money," but the

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(a) 1 C. B. 131.

word "money" is not used, or rather, I should say, has been carefully abstained from being used throughout the section wherever what is to be awarded by the arbitrators or by a jury is spoken of, and the invariable expression used is in these cases "amount of recompense or compensation," except where it is said that, if the jury shall assess a greater sum for the value, hire, or compensation than the sum previously offered by the company, the costs of the inquiry shall be borne by the company." It would be difficult to show that the recompense or compensation for the value of the land positively taken could be paid in anything else but money—certainly not in clay. But if it can be argued by Eksteen that the damage as well as the value must be ascertained in money, it must be open on the other hand to the company to argue that the direction to fill up the water-pit was *ultra vires*. Without dwelling upon this, however, as the proprietor is to be paid not only for the land taken, but also "for any damage which may be done by reason thereof," i.e., in this instance taking with, and as part of the land, the clay which Eksteen would have used in his business as a brickmaker had the land been allowed to remain in his possession, and the arbiters are to fix that damage according to what they shall consider "fair and reasonable," it would seem to me to have been within their competency to reduce the damage which the company were doing to Eksteen, not by taking his land from him, but "by reason thereof," or by taking the clay that was in the land, and depriving him of it for its use in his business as a brickmaker, by directing as their award does, that while the land shall be taken and paid for, the clay that is in the land should be excavated and carried by the company to Eksteen's pug-mill. That seems to me a "fair and reasonable" way, not of paying for the land, but of recompensing Eksteen for the damage done by reason of taking his land. These words "fair and reasonable" are to be read by the light of the words used in saying what a jury are to have regard to when fixing the amount of compensation. This would have been more obvious, if the award had directed that the company should allow Eksteen to excavate the clay and carry it to the pug-mill at his own expense, instead of at the company's

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—an expense which he must have been at if the ground had remained in his possession; and if the company had complained that this direction was *ultra vires* of the arbitrators, and put upon the company a burden which the arbitrators were not entitled to impose, it would have been difficult to have resisted such an argument. But coming before us, as the objection does, from Eksteen, and not from the company, it seems to me that the direction to excavate and remove the clay to Eksteen's mill at the company's expense, has not necessarily the effect of reducing "the just value by way of recompense" for the land taken from Eksteen, or of reducing the "amount of recompense or compensation to be paid" to him by how much that operation may cost the company; but may as well be said to have the effect, and to have been intended by the arbitrators to have the effect, of reducing the damage done to Eksteen by the company by reason of the taking of his land in which the clay is embedded. If the direction will bear this latter interpretation, then the Court, in support of the award, is bound to give that interpretation to it. If any state of facts would justify the direction, the Court is bound to presume that such a state of facts exists.—(*May vs. Cannell* (a).) It is agreeable, no doubt, but it by no means follows as a necessary consequence of the direction, that because the direction imposes a certain expense upon the company by directing the performance of an expensive *opus manufactum* by the company, Eksteen's right of payment in money is reduced in the amount by that expense. How can the Court know whether that expense may not be advantageous to the company? It would rather seem to me, I confess, that it will not be advantageous to the company; but how can the Court take upon itself to say that it positively will be disadvantageous? how can we positively say that the company will not at any rate have to excavate this clay, and deposit it somewhere? It seems to me that the arbiters have taken "a fair and reasonable" view of the damage which Eksteen would sustain by the operations of the company, and if they had ascertained and expressed it in their award in money as well

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(a) 24 Law Journal C. P. 4.

as money's worth, the award would have been beyond cavil or objection so far as regards the direction in regard to the excavation of the clay, which, as I have before observed, seems to have been intended to operate in derogation of the damage to be sustained by Eksteen. The award seems to me to be in substance correct, though in form defective, inasmuch as it does not in terms ascertain "the amount of recompense or compensation" in respect as well of the damage to be sustained by Eksteen, as of the value of the land to be taken from him, which was the matter referred. I am of opinion, therefore, that the matter should be referred back to the arbitrators, with an instruction that according to the legal interpretation of the 18th section the amount of the recompense or compensation, including in these terms the value to be paid for the land, and the damage to be done to Eksteen by the taking of the land, must be ascertained, and ought to be awarded in money, howsoever its amount may be ascertained by the arbiters, with this proviso, that the arbitrators may ascertain the amount of the damage both in money and money's worth, and put Eksteen to elect in which of the two modes he will choose to be paid. For this kind of order there is authority in the case of the *The Great North of England Railway Company vs. The Clarence Railway Company* (a), in which a distinction was drawn between statutory references such as this, and references by private agreement.

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CLOETE, J.:—As this is the first application of this nature which has been brought before us under the provisions of the 18th section of the Wynberg Railway Act, I wish to add a few words in confirmation of the judgment which has just been pronounced. It is quite clear that this 18th section is the law to govern both the Court in its interpretation of the duties of the arbitrators, and the arbitrators themselves in the performance of their duties. We therefore need not look to anything else but the precise wording of that section, giving the ordinary interpretation to the words contained in it. It is in vain for any one to

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(a) 1 Collyer's Cases in Chancery, 507.

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argue that anything else than money is to be paid in respect of the property taken by the company. Money, as has already been observed by my learned brother, is the measure of all things, and where the word is not used, the word "payment" implies it so clearly as to render its use unnecessary. It therefore appears to me that the arbitrators have not rightly considered the effect of the award they have come to. They have awarded firstly, that on taking possession of the land, the company shall pay to Mr. Eksteen the sum of £350; and they further direct and award that the company shall at their own cost and charges excavate to an average depth of 5 feet the brick clay under the land taken, and deposit it near the pug-mill, or at any other convenient place to be pointed out by Mr. Eksteen. The Attorney-General attempted to argue that the recompense and compensation to be paid to Mr. Eksteen was in effect the £350, the sum actually awarded in cash, and that the other things directed to be done, must be regarded as a sort of *douceur* or *bonus*, which the arbitrators did not actually require to be done, but which the company were to do if Mr. Eksteen required it. I certainly cannot attach much value to that argument. It is impossible for any reasonable man to come to any other conclusion than that the company having tendered Mr. Eksteen the sum of £400 in actual cash, as the amount of compensation, and Mr. Eksteen—although we have not got actual proof of it before us, it is notorious—claimed several thousands, the arbitrators—and I give them full credit for their desire to give him full, fair, and reasonable compensation—determined to compensate him partly in money, and partly, and to a far greater extent, in the very valuable brick clay, which he contended he was about to lose. Wishing to mete out fairly the full measure of compensation, they did not adhere strictly to the letter of the Act. They thought it fair and reasonable to award, perhaps, a far larger amount of compensation in kind than they might have otherwise felt justified in awarding in money, by giving him a very considerable amount of that compensation in brick clay, to be deposited at his pug-mill, which according to my reading of the section they were not competent to fix according to the

terms of the Act, which require them to fix and determine the amount of compensation "to be paid." The difficulty we had to consider was, therefore, whether the proceedings of the arbitrators must be set aside, or whether under the terms of the Act, the award could be referred back to them to amend the erroneous construction they had put upon the direction of the Act. And I am happy to find the distinction was made in the case referred to by my learned brother in his judgment. The clear rule is laid down in Russell on Arbitrators, p. 137 (a), that upon an award being once passed by arbitrators, it is final and conclusive, and if it is set aside, proceedings must be commenced *de novo*. But it appears that when arbitrators are appointed by virtue of an Act of Parliament for the purpose of carrying on a railway, they are in a different position from ordinary arbitrators appointed privately by parties to settle differences between them, and that under such circumstances arbitrators may make a second award, if the first is invalid. And I think that under the general principles of our Roman-Dutch law, we might also come to the same conclusion, and refer the award back to the arbitrators,—which is not to be understood as finding fault with anything they have actually done, but merely correcting a mistake of the law, into which they have fallen, by giving Mr. Eksteen compensation for the damage to be done to his property, partly in money, partly in kind, which, in the face of an express direction of the law, they had no authority to do. On these grounds I entirely concur in the judgment just pronounced, that the case shall be referred.

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WATERMEYER, J.:—In this case an objection has been raised to the award of the arbitrators, since it has directed that in place of paying money the company should excavate certain brick-clay within the ground taken from Eksteen and should deposit it near his pug-mill. It is no doubt contemplated by the whole of section 18 that the just value for land taken and damage done shall be paid in money. Then the question arises whether in what they have done

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(a) See Sixth Ed. 1882, p. 144.

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the arbitrators have gone beyond their powers. I do not think that it was exactly *ultra vires* of the arbitrators to order that to be done which they considered equitable under the circumstances, but whilst ordering this to be done they should have given it a pecuniary value. They should have said they ordered a certain thing to be done, or in case Eksteen should not be willing to accept the brick clay that he should receive a certain sum. Then the award would have been perfectly good. If they alter their award in this manner it will be, as I have said, perfectly good (a).

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*In re S. F. ROBINSON, an Insolvent.*

*Insolvency.—Examination.*

*When an insolvent is to be tried on a charge of culpable insolvency, the Court will not make an order for his examination in the civil proceedings.*

1863.  
Feb. 2.  
—  
*In re S. F.  
Robinson, an  
Insolvent.*

Motion *inter alia* for the examination of the insolvent and other persons. It appeared that the provisional trustee had referred the matter of the insolvency to the Attorney-General, and that the insolvent had been arrested on a charge of culpable insolvency.

*Watermeyer*, for the motion.

*Cole*, for the insolvent, opposed the application on the ground that it was contrary to the ordinary principles of justice to examine a man who was charged with a criminal offence as to facts which really were those on which he would be tried for a crime, and thus make out a case against him.

THE COURT refused to make an order for the examination of the insolvent.

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(a) The arbitrators subsequently valued the clay at £50, in accordance with the terms of this judgment.

TRUSTEE OF ARMSTRONG vs. TRUSTEES OF MONTGOMERY.

*Sale.—Non-fulfilment of conditions.—Resale.*

*A purchaser failed to pay in due time the full amount of the purchase money, and the vendor consequently resold the estate for a higher price: Held,—that he was not justified in so doing, and must repay the balance of the purchase money to the original purchaser's trustee.*

Action to obtain transfer of three erven bought by Armstrong from the defendants or for damages in lieu thereof. It appeared that at a certain sale Armstrong bought the erven with the buildings thereon for £656. One of the conditions of sale was that the purchase money should be paid in five instalments extending over three years, with security for the performance of the conditions. In consequence of a conversation between Goldman, the agent for the sale, and Armstrong, this proviso was not enforced. Payments on account to the amount of £235 were made by Armstrong; but in February, 1861, he being unable to pay the rest of the purchase money, the defendants proceeded to resell the property, which realised £825, or £169 more than at the previous sale. On 12th April Armstrong surrendered his estate, and his trustee now brought this action.

1863.  
Feb. 5.  
Trustee of Arm-  
strong vs.  
Trustees of  
Montgomery.

*The Acting Attorney-General and Cole* appeared for the plaintiff.

*Brand, Barry, and Watermeyer*, for the defendant, argued that the conditions of sale not having been complied with, the defendants had a right to resell the property.

THE CHIEF JUSTICE said that the Court were unanimously of opinion that the defendants had no power to resell this property; no such power was given by the contract of sale, there was no evidence that Armstrong assented to such resale, and under the general law no such power existed in the absence of a special clause in the contract. But as regarded the damages, it was probable that no substantial

1863.  
Feb. 5.  
—  
Trustee of  
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Montgomery.

injury had been done, as the property must have been sold by the plaintiff if it had not been disposed of by the defendant. The plaintiff was, however, entitled to the balance of the purchase money less the proper expenses of the sale.

### CRUMP AND ANOTHER vs. WILLIAMS.

#### *Sale.—Consideration.—Conditions.*

*In a sale of goods the receiving of a portion is a good consideration for the price of the whole when the full amount purchased has not been delivered, and the vendors have stipulated that they are not responsible for quantity, quality, or delivery.*

1863.  
Feb. 27.  
—  
Crump and  
another vs.  
Williams.

Action on two promissory notes for £250 each, the price of certain hay. It appeared from the evidence that one Heney sold a quantity of hay to one Miller, and then became insolvent. Miller soon after also became insolvent, and then the plaintiffs, his trustees, sold the hay to Williams, the defendant. The latter gave the two promissory notes in question for the price of the hay. The sheriff, on behalf of Heney's creditors, put in an execution on all the hay except a portion to the value of £160, which Williams had received, Heney having removed it before the seizure. The plaintiffs also sold the hay under the condition that they "would not be responsible for quantity, quality, or delivery." Williams defended the action on the ground of a failure of consideration.

*The Attorney-General and Barry, for the plaintiffs.  
Cole and Brand, for the defendants.*

THE CHIEF JUSTICE, after reciting the facts, said that there had been a consideration as to £160 at least. Moreover, when the sheriff seized the rest of the hay, the defendant should have challenged Heney's trustees' title. Thirdly, the defendant had chosen to consent to an unusual and stringent stipulation. On all these grounds the defence failed.

WATERMEYER, J., concurred.

## REG. vs. STURMAN.

*Homicide.—Assault.—Previous conviction.*

*A prisoner who was indicted for culpable homicide had been convicted of a common assault in respect of the same blow out of which the charge of homicide arose: Held,—that the previous conviction was no bar to the indictment for homicide.*

The prisoner had been indicted for culpable homicide of a Kafir at the Circuit Court of Fort Beaufort. It was proved that he had already been charged with a common assault on the same man, and the point was reserved whether the prisoner could be again legally placed on his trial for an offence arising out of the same facts.

1863.  
Mar. 3.  
R. vs. Sturman.

*The Attorney-General* appeared for the prosecution.

*Barry*, for the prisoner.

THE CHIEF JUSTICE said: — During the last Circuit a prisoner was indicted for culpable homicide. It was contended on his behalf that he had already been convicted of the same assault as that which caused the Kafir's death, and fined for it. Having considered the question reserved, we are of opinion that the former conviction is not a bar to the indictment for culpable homicide. The offence for which the prisoner was indicted is not the same as that in respect of which he has been previously convicted. To sustain the defence the offence should have been the same in both cases, which is not the case.

BELL and WATERMEYER, JJ., concurred.



## MECHAU vs. LOUW AND DE VILLIERS.

*Action for recovery of money.—Reference to Master.—Money expended on estate.*

*When a loan was partly expended on a landed estate it was referred to the Master to inquire if the estate had benefited thereby, and to what extent. Such an amount, if any, to be repaid by the estate and not by the borrower.*

1863.  
Mar. 3.  
—  
Mechau vs.  
Louw & De  
Villiers.

The point decided in this case appears from the following judgment:

THE COURT:—This was an action for the recovery of a sum of money advanced by one Haupt as the agent of the plaintiff to the defendants or one of them. Without going at length into the circumstances, it is clear De Villiers is personally liable for the whole amount of the loan, about £600. Louw at first supposed he could mortgage his estate as security, but in fact, by the will under which he holds it, he is bound to transmit it to his children free from all encumbrances. But some of the money advanced has actually been expended on the estate, and the Court is of opinion that it must be referred to the Master to inquire if and to what extent the estate has benefited by the expenditure. If the Master finds it has been enhanced in value, then the estate must bear so much of the debt as amounts to this sum, and the balance must be repaid by Villiers.

## REG. vs. MARAIS.

*Indictment.—Removal.—Notice.*

*Notice of a motion to remove an indictment should be given to the prisoner unless it is made for his benefit.*

1863.  
Mar. 26.  
—  
Reg. vs. Marais.

Motion to remove an indictment to Robertson for trial. The prisoner was out on bail, and no notice of the application had been given to him.

*The Attorney-General*, for the motion.

1863.  
Mar. 26.

Reg. vs. Marais.

THE COURT said that though in some cases notice to the prisoner of the motion had been dispensed with, yet it was only when it was as much for the benefit of the prisoner as of the Crown that the removal should take place. But the Court had no intention to supersede the general rule that notice must be given to a person of applications by which he might be affected. The application must therefore stand over for notice to be given to the prisoner.

EXECUTORS OF PELLAUS *vs.* THE WYNBERG RAILWAY  
COMPANY.

*Construction of railway.—Interruption of road.—Interdict.—  
Compensation.*

*When a railway was to cross a private carriage road, and the company would not place gates and gatekeepers there:—Held, that it was not proper to grant an interdict to prevent the railway crossing the road, but that it was a case for compensation.*

Motion for an interdict to prevent the respondents from cutting into or across a certain private carriage road. By section 21 of the Wynberg Railway Act no interruption to a carriage road should take place till the company had made proper approaches. It appeared the applicants were willing that the railway should cross the road if gates and gatekeepers were provided by the company, but the latter would only make gates.

1863.  
Mar. 31.

Executors of  
Pellaus *vs.* The  
Wynberg Rail-  
way Company.

*Watermeyer*, for the applicants.

*The Attorney-General*, for the respondents.

THE COURT held that section 21 had no application to such a case as this. By the terms of the Act the company were entitled to take property within certain limits of the deviation, and for such property and for injury caused by

1863.  
Mar. 31.  
—  
Executors of  
Pellans vs. The  
Wynberg Rail-  
way Company.

the undertaking, they must pay such compensation as a jury might award. In this case the applicants must claim compensation, and not ask for an interdict, which was not the procedure applicable to the case. The motion must therefore be dismissed, with costs.

MUNNIEK vs. HEATHERSHAW.

*Interdict.—Contract.*

*When the matter was a disputed contract interdict refused.*

1863.  
Mar. 31.  
—  
Munniek vs.  
Heathershaw.

Motion on behalf of one Munniek to restrain Heathershaw from selling to anyone a quantity of bricks which the applicant alleged had been purchased by him, as he had entered into a contract for the purchase of 150,000 bricks which was subsequently enlarged to 264,000. Of these 168,000 were delivered, and Heathershaw refused to deliver more.

*Watermeyer*, for the applicant.

*The Attorney-General*, for the respondent.

THE COURT held that the dispute was one as to a contract which ought to be decided by a jury, and should not be made the subject of an interdict. Interdict was therefore refused, with costs.

BLATCHFORD vs. BLATCHFORD.

*Award.—Rule of Court.*

*When an order of reference gives no special directions that an award shall be made in part, it is not competent for an arbitrator so to make it.*

1863.  
Apr. 11.  
—  
Blatchford vs.  
Blatchford.

Motion to make a partial award a rule of Court.

*The Attorney-General*, for the motion.

*Watermeyer*, contra.

It appeared from the order under which the arbitration was cancelled that it contained no special directions that the award should be made in part. The arbitrators had, however, completed one part of the dispute, and had made a first award.

1863.  
Apr. 11.  
Blatchford vs.  
Blatchford.

THE COURT held that such a partial award could not, having regard to the terms of the order of reference, be made a rule of Court, and refused the application, intimating that the final award must be prepared, and the motion made in reference to it.

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REG. vs. ROBINSON.

*Trial.—Indictment.—Amendment.—Act No. 3, 1861, § 2.*

*The Court has power to amend an indictment any time before verdict, and it is in the discretion of the Court to postpone the trial.*

S. F. Robinson had been found guilty of fraudulent insolvency, and during the trial Watermeyer, J., had allowed the indictment to be amended by substituting for the words "seventy-nine cases of agricultural implements and divers other articles to the prosecutor unknown" the words "seventy-nine cases containing merchandize and certain cases containing agricultural implements." The point reserved was whether such an amendment could be made during the trial.

1863.  
May 19.  
Reg. vs. Robinson.

*The Attorney-General*, for the prosecution, argued that by Act No. 3, 1861, s. 2, such an amendment was good, because it did not prejudice the prisoner.

*Watermeyer*, for the prisoner, argued that the amendment was made too late, and that the change involved a charge in respect to quite a different description of property. He referred to *R. vs. Rymes (a)*. He also argued that if an amendment was made the trial should have been postponed.

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(a) 3 Carrington & Kirwan, 326. But see Archbold's Criminal Pleading, 19th ed., p. 225.

1863  
May 19.  
Reg. vs. Robin-  
son.

THE CHIEF JUSTICE said that according to Act No. 3, 1861, a judge had full power to amend an indictment at any time before the delivery of the verdict. A prisoner would not be prejudiced thereby, because the counsel for the defence had the right to address the Court in opposition to the amendment before it was allowed by the Court. As to the postponement of the trial after the amendment had actually been made, that by the above Act was a matter entirely in the discretion of the Court, and this Court would not interfere with that discretion.

BELL, J., concurred.

Conviction affirmed.

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DE SMIDT vs. SIEBRITS.

*Surveyor.—Plans.—Transfer.*

*A surveyor having been ordered by a purchaser to make a survey and prepare diagrams for the transfer of a property, did not include therein a portion of adjoining land not belonging to the same seller. In an action for money payable: Held,—that he was entitled to recover, as it was his duty not to include any but the seller's property.*

1863.  
June 27.  
De Smidt vs.  
Siebrits.

Action to recover £25, being in respect of work done by the plaintiff for the defendant in surveying a farm for the purpose of transfer, and in preparing diagrams.

The defendant denied his liability, on the ground that the survey had been incompletely made, since it only extended over 36 morgen and 29 square roods, whilst the whole contents of the property which the plaintiff was instructed to survey consisted of 44 morgen and 24 square roods, and that in consequence of the plaintiff's error the defendant had been obliged to get the deed of transfer cancelled, and to have a new survey and a new deed prepared. The plaintiff's reply to this was, that the part of the property which he did not survey or include in the diagrams belonged

to a person other than the one from whom the defendant was purchasing; that he adhered to the proper boundaries of the property, and would have done wrong to include anything more in his diagram than he did.

Witnesses having been examined—

*Watermeyer*, for the plaintiff, addressed the Court.

*Brand*, for the defendant.

BELL, J.:—The Court is quite satisfied that the plaintiff has only done his duty as a sworn surveyor in not including in his plans land which belonged to another person than the seller, although it was said that person was willing to give transfer. There must of necessity have been a distinct transfer of the eight morgen not surveyed by the plaintiff, and of these the plaintiff had expressed his willingness to make a separate survey and to furnish separate diagrams. So far as the property to be transferred was concerned, the diagram as prepared by the plaintiff was the only one on which transfer could be obtained. Under these circumstances the Court had no doubt that the plaintiff had acted properly, and was entitled to recover the sum sued for in the action.

THE CHIEF JUSTICE and WATERMEYER, J., concurred.

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*In the* MATTER OF AN ATTORNEY.

*Attorney.—Admission.*

Motion for the admission of M. B. Beevor as an attorney of the Supreme Court. It appeared that the applicant had been in the Colony for nine months, and had previously practised in England.

1863.  
June 27.

*In the Matter of  
an Attorney.*

*Watermeyer*, for the motion.

BELL, J.:—We grant the present application, but it must be understood that in future, applications of this nature when the parties come from England must be

1863.  
June 27.  
—  
*In the Matter of  
an Attorney.*

supported by evidence, not only that they have practised in England, but that nothing has occurred to disqualify them from so practising up to the time of their departure from Great Britain. Mr. Beevor may be a perfectly respectable person, and we therefore will not refuse this application, but we desire to lay down a rule for the future.

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*In re HATTON, an Insolvent.*

*Rehabilitation.—Culpable bankruptcy.*

*Rehabilitation refused in the case of an insolvent who had drawn bills, knowing that he had not funds to meet them.*

1863.  
June 27.  
—  
*In re Hatton,  
an Insolvent.*

Motion for rehabilitation of the insolvent. It appeared that the insolvent had drawn certain bills, and had, as he well knew, no funds to meet them. The sequestration took place in June, 1862.

*Watermeyer*, for the motion.

THE COURT refused to grant rehabilitation, on the ground that the insolvent should not have drawn bills which he knew he would be unable to meet, and yet by so doing lead people to suppose the bills would be paid. The application might be renewed after the lapse of one year.

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*MUTER vs. HARDCASTLE.*

*Mortgage.—Attachment.*

*An attachment of lands is not required in the case of an unsatisfied mortgage.*

1863.  
July 27.  
—  
*Muter vs.  
Hardcastle.*

Motion for the attachment of certain farms mortgaged by the defendant. The plaintiff was the assignee of the mortgage bonds. The mortgage had not been satisfied.

*The Attorney-General*, for the motion.

THE COURT said that in the case of an unsatisfied mortgage bond an attachment was altogether unnecessary. The plaintiff could enforce her right by the usual legal process in case of unpaid mortgages, and the application must therefore be refused.

1863.  
July 27.  
Muter vs.  
Hardcastle.

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DE SMIDT vs. SIEBRITS.

*Plaintiff.—Witness.—Costs.*

*When a party is a necessary witness he is entitled to his expenses.*

This was a question referred to the Court as to costs, and part of it related to the costs of the plaintiff as a witness.

1863.  
Aug. 1.  
De Smidt vs.  
Siebrits.

Watermeyer, for the plaintiff, argued that he was a material witness, and therefore according to Act No. 4, 1861, he was entitled to his expenses.

Benangé, for the defendant, argued that plaintiff could not charge his expenses.

THE COURT held that the plaintiff was a necessary witness to support his own case, and that he was therefore entitled to make a charge for his expenses. But the costs in this respect must of course be taxed, and he would then name a proper sum for his attendance.

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WOOD AND CO. vs. THE LOWER ALBANY FLOCKMASTERS' ASSOCIATION.

*Execution.—Directors.*

*A writ of execution was issued against directors personally.*

Motion for a writ of execution against certain persons who were directors of the Lower Albany Flockmasters' Associa-

1863.  
Aug. 8.  
Wood & Co. vs.  
The Lower  
Albany Flock-  
masters' Asso-  
ciation.



1863.  
Aug. 8.  
—  
Wood & Co. vs.  
The Lower  
Albany Flock-  
masters' Asso-  
ciation.

tion. Judgment had been obtained against the defendants as directors, but the sheriff had made a return that he could find no property in the possession of the defendants which belonged to the association. This application was therefore made for the purpose of making the defendants personally liable.

*Brand*, for the plaintiffs.

*Watermeyer*, for the defendants.

THE COURT said that the directors were liable for the debts of the association, and after it was paid they could obtain restitution from their fellow-shareholders. Therefore, under the circumstances of the case, the Court would make the order asked for.

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#### TRUSTEES OF McMASTER vs. KRUGER.

*Insolvency.—Undue preference.—Property.*

*When property which at the time of the agreement was not de facto in the possession of a person whose estate was afterwards sequestered is agreed to be transferred to a creditor, it cannot be recovered back by the trustees on the ground of undue preference.*

1863.  
Aug. 13.  
—  
Trustees of  
McMaster vs.  
Kruger.

Action to recover back certain premises, a sum of £271 rent of the same, and £623, the value of certain sheep, on the ground that they had been obtained by the defendant in undue preference to the other creditors of McMaster. It appeared that in 1858 McMaster was indebted to Kruger senior, the father of the present defendant, in the sum of £1050, and that he offered to transfer to him an hotel and piece of ground in satisfaction of this debt. Kruger senior died in 1859, and the defendant, his executor, was desirous of obtaining possession of the above-named property. At that time McMaster could not give transfer of the property, as he had not received it from one Josephus, from whom he had bought it, not having paid the latter

the full amount of the purchase money, there being £623 outstanding. Kruger then agreed to pay this money if McMaster would make over to him 800 sheep. McMaster agreed, and made over the sheep, and Kruger then gave his bill for £623 to Josephus. In April, 1860, the estate of McMaster was compulsorily sequestered. In September, 1860, the premises were transferred to McMaster, who on the same day transferred them to Kruger. The plaintiffs alleged that at the time McMaster offered to transfer the premises to Kruger senior he was insolvent, and that they were entitled to recover back the premises and to recover the rent and the value of the sheep from the defendant.

1863.  
Aug. 13.  
—  
Trustees of  
McMaster vs.  
Kruger.

*The Attorney-General, Cole and Watermeyer*, appeared for the plaintiffs.

*Barry*, for the defendant.

THE COURT held on the evidence that McMaster at the time of the above transaction was insolvent, and intended to give Kruger senior a preference over the other creditors. But as the hotel and premises were not at the time *de facto* the property of McMaster, the transaction so far as they were concerned could not be impeached. As regarded the sheep however, the plaintiffs were entitled to recover their value.

#### LAUSON vs. PRITCHARD AND LAUSON.

*Will.—Attestation.—Ordinance No. 14, 1845.*

*A will having been signed by the testator when the witnesses were in another room with the door between ajar: Held,—an invalid attestation.*

Action to set aside a will on the ground of an improper attestation. It appeared that the testator signed his will with great difficulty, and that it was then taken into another room, where some erasures were made, and the will was

1863.  
Aug. 22.  
—  
Lauson vs.  
Pritchard &  
Lawson.

1863.  
Aug. 22.  
—  
Lausonss  
Pritchard &  
Lawson.

signed. The door at that time was ajar so that it was not possible to see from one room into another.

*Cole* and *Watermeyer*, for the plaintiffs, argued that it was absolutely necessary for the validity of a will that it should be attested in the presence of the testator.

*Barry*, for the defendants, the executors of the will, argued that the attestation was sufficient. The Roman-Dutch law was less strict than the English, and it should govern this case.

**THE CHIEF JUSTICE:**—It is best that when such a case as this comes before us we should lay down some general rule which can be applied in all cases, though by so doing it may seem hard in the particular case where no deliberate wrong has been done. The Ordinance No. 14, 1845, requires that witnesses shall attest and subscribe a will in the presence of the testator, and it is clear from the evidence in this case that this will was signed by the attesting witnesses in a room other than that in which the testator was, and that the door between the two rooms was either closed or ajar, at any rate in such a position that it was impossible for the testator to see the witnesses sign the document. This seems to us to be an invalid attestation. We further think that when the circumstances will permit we should hold ourselves bound by the decisions of the English Courts unless there is some strong reason to the contrary. To hold this attestation invalid would be to make the rule of this Court uniform with that of the English Courts, and therefore the Court would pronounce the will invalid. The costs of all parties to be paid out of the estate.

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*In the GOODS OF BOYES.*

*Will.—Letters of administration.—Stamp Act, No. 12, 1863.*

*As a will only comes into use after the death of the testator, the Stamp Act in force at the time when it is lodged with the Master applies to it, and not an Act in force at the time of its execution.*

Motion to order the Master of the Supreme Court to issue letters of administration to the widow and executrix of W. Boyes deceased, who executed a joint will in 1847, upon paper bearing a stamp for one shilling and sixpence. The Master was, however, of opinion that the will should bear the stamp imposed by the Act No. 12, 1863, viz. two shillings, when the value of the property did not exceed £100.

1863.  
Aug. 27  
Oct. 15.  
In the Goods of  
Boyes.

*Watermeyer*, for the motion, argued that the new Act, No. 12, 1863, could not affect a will made before it was passed.

*The Attorney-General*, for the Crown, argued that a will did not come into use until after the death of the testator, and therefore the new Act applied to them.

*Cur. adv. vult.*

THE COURT held that the provisions of the Act No. 12, 1863, so far applied to wills stamped before the death of the testator, that a further stamp was required when they were put to use by being lodged with the Master for the purpose of obtaining administration. Therefore a further payment of eight shillings and six pence was required to make up the sum of ten shillings payable under the new Act.

1863.  
Oct. 15.  
—

## TROOST vs. ROSS.

*Will.—Witnesses.—Ordinance No. 15, 1845.*

*By Ordinance No. 15, 1845, when a testator signs by means of a mark, the two witnesses required by that Ordinance must be present, but a third witness, in accordance with the Roman-Dutch law, is not required.*

1863.  
Aug. 27.  
Troost vs. Ross.

Action against the validity of a will. The will in question had been executed by the testatrix by her mark, and the will had been attested by two witnesses. In addition to the question of fact as to the mental capacity of the testatrix at the time of such execution, a point of law was raised by the defendant, that though by the Ordinance No. 15, 1845, two witnesses were ordinarily sufficient, yet that the previous Roman-Dutch law applied to the present case. By that law, in addition to the seven witnesses usually required, an eighth witness was needed when a person could not write his name, in order to write the testator's name for him, and it was contended that the above Ordinance had not abrogated the former law in this particular point.

*The Attorney-General, for the plaintiff.*  
*Watermeyer, for the defendant.*

THE COURT, after dealing with the facts of the case, and holding that the will was executed by the testatrix with full knowledge and understanding, proceeded to deliver judgment on the point of law. Their Lordships were of opinion that the mark of the testatrix in the presence of two witnesses, as required by Ordinance No. 15, 1845, was a valid signature. They did not consider that they were bound to apply the Dutch-Roman law to a case for which modern legislation had made a statutory provision which did not contain any express prohibition of the use of a mark or any express requirement of the presence of a third witness. If the Legislature had required that a third witness should be present in the case of a testator who could not write, but

yet could affix what two witnesses could see and attest to be his mark, the Ordinance in question would have said so in express terms. Their Lordships felt therefore no difficulty in also upholding the will on this point.

1863.  
Aug. 27.  
Troost vs. Ross.

## HOPLEY vs. VAN SCHALKWYK.

*Attachment.—Contempt.—Failure to bring action.*

*Disobedience of an order to bring an action is not such a contempt of Court as will cause the person so disobeying to be attached.*

Motion for the personal attachment of the respondent on the ground that he had failed to bring an action against the applicant. It appeared that an action of trespass had been originally brought by the respondent, but as the real object of the action was to ascertain certain boundaries, BELL, J., had ordered the respondent to bring an action specially for this purpose against the applicant and four other persons.

1863.  
Aug. 27.  
Hopley vs.  
Van Schalk-  
wyk.

Barry, for the motion, argued that as the action had not been brought, the respondent had in fact been guilty of contempt of Court.

Cole, for the respondent, produced affidavits to show that the respondent had in fact instructed his attorney to bring the action, and that he (the respondent) was not to blame for the delay.

THE COURT said that the failure on the part of the respondent to obey the order and to bring the action, assuming it to be proved, was not a reason for committing a man to prison. The penalty was paid by the man himself, since he would lose the costs of the informal action, and not obtain what he wished. But in the present case it appeared that the respondent had set the matter in motion, and the Court would therefore only make an order that the action be tried at the first Circuit Court at Burghersdorf.

PART I.

H

## HAYCROFT vs. FILMER.

*Provisional sentence.—Fraud.—Sheriff's return.*

*A provisional sentence was stayed on the ground that it had been obtained on a forged document. But a sheriff's return was held to be good on its face, and it was ground for an action for damages if it was an improper return.*

1863.  
Sept. 24.  
—  
Haycroft vs.  
Filmer.

Motion for a rule calling on Haycroft to show cause why he should not be restrained from carrying out a provisional sentence obtained against the defendant by Haycroft. It was alleged that a promissory note, on which the sentence had been obtained, was forged by one Pringle, who had been a co-defendant in the case, and that the present applicant had been ignorant of the proceedings against himself until a writ of execution had been served on him. The return of the sheriff in the original summons was that it had been served at his house on E. Filmer, in the absence of his brother, the defendant. E. Filmer, however, stated that he had not been served with the summons in question.

*Watermeyer*, for the motion, argued that the Court would grant relief against a judgment obtained on a forged document.

BELL, J., said that he saw much difficulty in consenting to disturb an existing judgment of the Court, except by action regularly brought. The applicant could not ask the Court to go behind the return of their officer, that the applicant had been duly summoned. If the sheriff had made a false return, he was liable in damages, but the Court could not be influenced by an affidavit alleging that his return was faulty. If, then, the applicant must be held by the Court to have been in default on the first of August, when judgment was given, it was difficult to see how he could be allowed now to make a defence, which by law he could have made in August. Moreover, if the sheriff had made a wrong return, the applicant had a remedy against him by an action for damages, and, further, the applicant

could apply to set aside the provisional sentence in the usual way.

1863.  
Sept. 24.  
Haycroft vs.  
Filmer.

CLOETE, J., held that the affidavits alleging that the note had been forged, and that the original summons had not been duly served, were sufficient to enable the Court to give the relief prayed. He was of opinion that a plaintiff who had obtained a provisional sentence was not injured if the Court stayed it on grounds which would have been sufficient to cause them not to grant the sentence if they had been alleged at the time at which it was applied for.

WATERMEYER, J., said he was of the same opinion as Mr. Justice BELL, as to the impeachment of the sheriff's summons, and on the 1st of August, Filmer must be considered to have been duly before the Court. But assuming that an action could be at once brought to set aside the provisional sentence, he thought the Court had jurisdiction to stay it at once. But he must require the applicant to bring the formal action at once, if he consented now to stay the provisional sentence.

BELL, J., withdrew his former opinion as to the stay of the summons, and—

The *rule nisi* was granted, returnable on October 12th.

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MATHERS AND GREEN vs. M'SEVENRY.

*Resident Magistrate.—Writ.—Act No. 20, 1836, § 12.*

*A Resident Magistrate has no jurisdiction to refuse to issue a writ upon a valid judgment not appealed against.*

Motion for a rule calling on the Magistrate of Colesberg to return certain proceedings into Court, and to show cause why he should not issue a writ of execution on a judgment granted by him in favour of the plaintiffs for £24 and costs.

1863.  
Oct. 1.  
Mathers & Green  
vs. M'Sevenry.



1863.  
Oct. 1.  
Mathers & Green  
vs. M'Sevenry.

It appeared that the plaintiffs' agent had, on July 16, in the usual manner presented the writ for the signature of the Magistrate, but he had declined to issue it on the ground that he was informed by the defendant that he was about to surrender his estate. On the 27th of August a second application had been made to the Magistrate and the latter again refused it. It appeared that the schedules of the defendant had been presented to WATERMEYER, J., but that they had not been accepted, as further information was required.

*Watermeyer*, for the motion.

THE COURT were of opinion that the Magistrate had acted quite wrongly in refusing to issue the writ, but they were doubtful to what extent the Supreme Court had jurisdiction over the Magistrate's Court in other respects than as a Court of Appeal. They, however, would make the order that the Magistrate should return the proceedings into the Supreme Court, and would also grant a rule calling on the Magistrate to show cause as desired, but they hoped the intimation of the opinion of the Court would render further proceedings unnecessary.

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REG. vs. KOSA.

*Assault.—Kaffir.—Ordinance No. 49, 1828, § 12.*

*A policeman having entered a hut, on the chance of finding a Kaffir without a pass, was assaulted by a Kaffir within.*

*Held, that the Kaffir could not be convicted of assault, for the policeman was not justified in entering the hut, such Kaffir not having been found or discovered within the meaning of Ordinance No. 49, 1828.*

1863.  
Oct. 17.  
Reg. vs. Kosa.

Question for the opinion of the Court whether the prisoner had been rightly convicted by the Resident Magistrate at Fish River for an assault on two of the frontier police.

*The Attorney-General* appeared in support of the conviction.

The facts out of which the question arose, and the point for the determination of the Court appear from the following judgments.

1863.  
Oct. 17.  
Reg. vs. Koss.

**BELL, J.**—It appears that Milwall, a corporal in the frontier police, and Griffin, a private, went to Lambert's Farm on the Fish River to look for Kaffirs without passes. They went to the prisoner's hut to see if there were any there. It happened that there was a Kaffir in the hut who would not come out to show his pass, whereupon Griffin went into the hut, and as he was entering the prisoner struck him on the head with a knobkerrie. He was obliged to come out again, and the police had to take down part of the hut, and then make a rush to get at the Kaffir, who before he was seized struck Milwall with the knobkerrie.

The broad position taken up by the prosecution is, that any officer of the police is entitled to instruct a corporal and men, to go about the country hunting for Kaffirs without passes. It may be and probably is their duty, but it is further said that they are entitled to go into a hut, to enter it forcibly if need be, and even to pull it down if necessary. But in the case of so harsh a law as this, the Court will never carry it further than they can help, for the Kaffirs are men and are entitled to be treated as ordinary men. It seems to me that the words, if any Kaffirs, "shall be found," mean that if Kaffirs shall be found travelling on the road, they may be required to produce their passes; not that a constable is to go about the country turning out a Kaffir from every hut he may see. That would be an abuse of the law which the Court will not sanction. If the officers meet a man with anything suspicious about him they may stop him, but that is all which the law allows them to do. The word "discover" was not intended to enable police officers to demand passes anywhere, and even to pull down huts to get at them. You cannot be said to discover a man in his own hut, for that is the proper place wherein to be; to come across a man in his own hut is neither "to meet" nor to "discover" him. If the police had had information that there was a Kaffir in the hut without a pass the case

1863.  
Oct. 17.  
Reg. w. Kom.

might have been different. But on remitting the case to the Magistrate for information on this point, the police appear to have had no such information. Therefore it appears to me that there was no reasonable ground to justify the police in entering the hut in question, the resistance of the prisoner was not unlawful, and it would be carrying a harsh law even beyond its present harshness if we did not pronounce that the prisoner has been improperly convicted, and that this conviction must therefore be quashed.

CLOETE, J., concurred.

JUTA THOOFT AND CO. vs. GLYNN.

*Provisional sentence.—Assignment.—Consent.*

*Provisional sentence was refused on a promissory note when the plaintiffs had virtually assented to an assignment for the benefit of his creditors by the defendant.*

1863.  
Oct. 17.  
Juta Thooft &  
Co. vs. Glynn.

Motion for provisional sentence. The plaintiffs were the holders of a promissory note, dated 15th August, 1862, which became due on February 15th, 1863. On January 20th the defendant executed a deed of assignment in favour of W. Searle & Co., Pzy, as trustees, for the benefit of his creditors. The trustees had power, *inter alia*, to take up and retire at maturity all promissory notes payable by the defendant. The deed was signed by all the creditors of Glynn, except the plaintiffs, who, by an oversight, had not been summoned to attend the meeting of creditors. When the mistake was discovered, J. H. Parker, who was an accountant employed by the trustees, called at the plaintiffs' office and asked Juta to sign the deed of assignment. Juta said that he would see his partner before signing, but in the meanwhile would instruct his attorney to stay proceedings, which was done. Afterwards the trustees called and requested Juta to sign the deed, the latter said it was not convenient to do so then, but that it would be all right,

from which the trustees considered that Jutta assented to the arrangement. On April 13th the first dividend was advertised as payable at Parker's office. On June 11th, one Pilkington obtained an order from the Court restraining the trustees from parting with any of the proceeds of the estate until an action brought by him should have been decided. Shortly afterwards Thooft met Parker and asked whether the advertised dividend was payable, and Parker explained the reason why it was not. Nothing further was heard of the plaintiffs' claim till the defendant brought the trustees the summons issued by the plaintiffs. The plaintiffs filed affidavits denying that they had ever assented to the assignment.

1863.  
Oct. 17.  
Jutta Thooft &  
Co. vs. Glynn.

After argument—

THE COURT said that the facts showed a virtual approbation and adoption of the assignment by the plaintiffs, which would prevent them from recovering judgment against the assigned estate. The plaintiffs should have stated their dissent at the earliest possible time, but by the line of conduct they had adopted they had given rise to the impression that they agreed to the assignment. Provisional sentence must therefore be refused, and they must proceed, if they thought fit to do so, in the principal case.

Provisional sentence refused, with costs.

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#### REG. vs. TURPIN AND BLAKE.

*Theft.—Accessories after fact.*

*A prisoner, who is indicted as having committed a theft, cannot be convicted as an accessory after the fact.*

The point decided by the Court appears from the following judgment of

CLORE, J.:—At the late Criminal Sessions you two prisoners were indicted with one Whitley for theft, namely, that you stole a certain coat. The evidence showed that Whitley stole

1863.  
Nov. 14.  
Reg. vs. Turpin  
& Blake.

1863.  
Nov. 14.  
—  
*Reg. vs. Turpin  
& Blake.*

the coat and took it to a place where you were with the intention of selling it. He then tried to get another person to advance money on it, and with a view to assist Whitley in so doing, you both swore you saw him receive the coat as a gift in the morning from the Reverend Mr. Lightfoot. The jury convicted Whitley of theft, and you as being accessories after the fact to that theft. I reserved passing any sentence on you, as I had great doubt whether, by the law of this Colony, such a charge could be preferred at all, and whether, if convicted of such a charge on an indictment for theft, the verdict could be sustained. My learned brothers have discussed the point with me, and we have also considered the case of *Reg. vs. Felton*, (a) and we are of opinion that a person cannot be convicted as an accessory after the fact upon an indictment charging him as principal felon. The conviction must therefore be quashed.

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*In re EAGLESEIN, an Insolvent.*

*Provisional Trustees.—Number.*

*The Court discourages the appointment of more than one provisional trustee.*

1863.  
Nov. 22.  
—  
*In re Eaglesein,  
an Insolvent.*

Motion for the appointment of two persons as provisional trustees of the insolvent's estate. All the creditors had signed the petition.

*The Attorney-General*, for the motion.

BELL, J., said the Court always set its face against double appointments, on the ground that they were contrary to the interests of the estate, and the Court would not consent to the appointment of two persons in the same place, unless some special reason was shown for so doing.

CLOETE, J., said he was also of opinion that it was an

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(a) 62 L. J. M. C. 66.

inconvenient course to appoint two trustees, for they might differ as to arrangements in regard to the estate. At the same time he disliked not to make the appointment when all the creditors desired it. Under the circumstances, however, he thought only one trustee should be appointed. (a)

1863.  
Nov. 22.  
*In re Eagleson,  
an Insolvent.*

### MUNICIPALITY OF SWELLENDAM *vs.* TODD.

#### *Municipal Regulation.—Ordinance 9, 1836.—Procedure.*

*The procedure for the recovery of penalties, under Ordinance 9, 1836, is not a criminal proceeding, but a quasi civil proceeding, and in the nature of an action for penalties.*

Appeal from a decision of the Resident Magistrate at Swellendam.

1863.  
Nov. 24.  
*Municipality of  
Swellendam vs.  
Todd.*

The respondent Todd had been summoned for allowing his horse to drink out of a public watercourse, contrary to Section 20 of the Municipal Rules.

*Watermeyer*, for the appellants.

*The Attorney-General*, for the respondent.

BELL, J.:—This case comes before us as an appeal from the decision of a Resident Magistrate in a criminal prosecution. The summons was in the form of a criminal proceeding, and if it was correct, the respondent should have been placed in the dock as an ordinary criminal. But the appellants misapprehended the proper form of proceeding to be adopted under Ordinance 9, of 1836. The proceedings should have been in the form of an action for the recovery of a penalty. The Ordinance says that it shall be lawful for the Commissioners to sue, and by section 47 the mode of recovering the penalty if it is not paid is pointed out. But the Ordinance says nothing about a sentence of fine or

(a) In a previous case of *In re Keyter*, an insolvent, two trustees were appointed on the express wish of the creditors on a large estate.

1863.  
Nov. 24.  
Municipality of  
Swellendam vs.  
Todd.

imprisonment, the person summoned is in the first instance liable to a penalty. It is in fact a mixed criminal and civil proceeding, but it is clearly not a criminal proceeding pure and simple. But having thus mistaken the procedure before the Magistrate, the appellants come to this Court as if they were appellants in a civil proceeding, whereas having acted as prosecutors and having taken criminal proceedings, they cannot come here as appellants.

[The learned JUDGE then proceeded to consider the facts and dismissed the appeal, WATERMEYER and CLOETE, JJ., concurring.]

*In re HORAK.*

*Provisional trustee.—Medical man.*

*A medical man not appointed as provisional trustee.*

1863.  
Dec. 10.  
*In re Horak.*

Motion for the appointment of one Fotheringham, a doctor, as provisional trustee of the estate of the insolvent.

*Watermeyer*, for the motion.

THE COURT refused to make the appointment, on the ground that a medical man was not a proper person to be appointed a provisional trustee.

*JAMES vs. WEBB.*

*Practice.—Arrest.—Confirmation.—Discharge.*

*When a debtor is arrested upon a summons to give security, on the day on which it is returnable, the plaintiff should ask for the arrest to be confirmed, or the defendant for his discharge.*

1863.  
Dec. 12.  
*James vs. Webb.*

Motion for provisional sentence on a promissory note for £50.

It appeared that the defendant had been arrested upon a summons to give security in August, returnable on the 29th of that month. Neither the plaintiff nor the defendant had taken any steps in the matter, and the defendant had been in prison since that date.

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*The Attorney-General*, for the plaintiff.

The defendant, in person.

BELL, J., said that the return day for the summons was the 29th of August, and the summons should have been filed and brought to the notice of the Court, and the plaintiff should have taken this step, namely, have asked for a decree confirming the arrest. The plaintiff had therefore entirely failed to take a proper course. The defendant had been equally neglectful, for he ought either personally or by counsel to have appeared in Court, and when the plaintiff failed to ask for a continuance of his arrest, to have demanded his discharge. Provisional sentence must be granted on the note in question, but the Court would not grant the plaintiff his costs of the arrest, which is discharged.

CLOETE and WATERMEYER, JJ., concurred.

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THEUNISSEN vs. THEUNISSEN.

*Will.—Condition.—Forfeiture.—Transfer.*

*Transfer of land left by will was ordered after possession under a bequest had in fact been taken by the devisee—although he desired to renounce at the time of action.*

Action of the plaintiff, as widow and executrix of J. M. Theunissen, against N. and J. Theunissen, praying that they might be condemned to take a transfer of a certain farm and to pay its value to the plaintiff. The plaintiff and her husband made a joint will, by which it was provided that the farm in question should go to the testator's two sons (the defendants) upon payment by them into the estate of the sum now sued for. The will further provided that the

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defendants should not be able to sell the land out of the family or to mortgage it, but should one of the sons wish to dispose of his share, he should sell it to the other for half the price named. The testator died on April 12, 1861, and letters of administration were granted to his widow.

The first defendant, N. Theunissen, set up that he was entitled to relinquish the bequest, not having complied with the condition attached thereto. On the other hand, it appeared that he had taken possession of his share of the property and had been in negotiation with his brother as to purchase of his share, and he had also leased his own half share for £125 per annum.

The second defendant admitted the plaintiff's case.

*The Attorney-General*, for the plaintiff.

*Watermeyer*, for N. Theunissen.

*Brand*, for J. Theunissen.

THE COURT held that possession having been in fact taken of this property, and acts of ownership having been exercised over it, the defendant must be considered as having accepted the bequest, and could not now renounce it. The plaintiff was therefore entitled to the order claimed, with costs against the first defendant.

#### DE PASS AND Co. vs. RAWSON.

*Lease.—Undisturbed possession.—Colonial harbour.—Act No. 11, 1851.—Table Bay.—Act No. 10, 1858; Act No. 6, 1860; Act No. 16, 1861.*

*Conterminous proprietors have the right to do such work as they please to their own properties, even though it injures the neighbours' property, so long as it is done for the benefit of the property without an intention to injure. The Colonial Government having given a license to the plaintiff to use certain land in Table Bay on the shore for purposes of a slip for ships, proposed to make a breakwater near the spot, and offered to take the plaintiffs' land and pay expenses incurred by them, which offer was refused.*

*The plaintiffs subsequently brought an action against Rawson, the Colonial Secretary, as the representative of the Colonial Government for injury to the slip. Held, that no action would lie except for negligent working by the Government, and that as such negligence had not been proved the Colonial Government were not liable in the action.*

Action for damages against the Colonial Secretary as the representative of the Colonial Government.

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*Watermeyer*, for the plaintiffs.

*Denyssen, A.G.*, for the defendant.

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The facts and legal questions involved are fully set forth in the judgment of *BELL, J.*

*Our. adv. vult.*

*BELL, J.*:—In this case the plaintiffs by their declaration allege that on the 10th of March, 1859, they had entered into an indenture with the defendant, acting on behalf of the Colonial Government, whereby he let to them a piece of ground on the shore of Table Bay, for the period of thirty years, and that the defendant covenanted by the indenture that they should have undisturbed possession of the ground for the term specified, on paying a yearly rent of one shilling, they undertaking to erect upon the ground a patent slip, to be completed without avoidable delay. They further allege in their declaration, that it was the intent of the indenture, that in addition to the ground leased by it they should have a right of approach from the sea "to the said land, in such a way, and to such extent as should render the said land available for the use thereon, and on so much of the bed of the sea adjoining as should be necessary of the patent slip about to be constructed, and of the works essential thereto." The declaration then alleged that the patent slip had been erected without any delay, and, after shortly referring to Acts of Parliament, in regard to the construction of a breakwater and docks in Table Bay, the declaration set forth, that according to the intent of the indenture between the plaintiffs and the defendant and of the Acts referred to, it was the duty of the Colonial Government, in proceeding

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with the construction of the breakwater and docks, to secure the plaintiffs in the unobstructed use of the ground described in the indenture for the purpose of a patent slip, so long as they fulfilled the conditions of the indenture, but that at various times since the completion of the slip works, the Colonial Government, acting through a Board of Commissioners appointed by it, under the authority of one of the statutes referred to, had "carelessly, negligently, wrongfully, and unskilfully, put and placed, or caused to be put and placed, large quantities of earth, soil, stone materials, and rubbish in that portion of the bed of the sea which borders upon the ground leased to the plaintiffs, and upon the portions of the slip which were constructed under water, or had carelessly, negligently, and unskilfully so placed such earth, soil, stone materials, and rubbish as that they were thereafter inevitably driven upon the works of the slip." That the slip had become wholly useless and without value, because in consequence of this accumulation of materials ships could not now be raised upon the slip for purposes of repair: that the plaintiffs have applied to the Colonial Government, and to the Harbour Commissioners for the removal of the obstructions thus created, but without avail. Upon these statements the declaration prayed that the defendant, as acting in behalf of the Colonial Government, might be decreed to remove the obstructions, and to pay the plaintiffs damages after the rate of £250 per month, from the first day of July last, being the date of their first application for removal of the obstruction, or otherwise to pay the plaintiffs £20,000 damages. To this action the defendant, on behalf of the Colonial Government, pleaded these dilatory defences: 1st. That the plaintiffs had assigned their interest in the lease in question to third parties, who, therefore, and not the plaintiffs, were entitled to sue; 2nd. That the supervision of the works and the administration of the funds for effecting them having been by statute vested in the Board of Commissioners already referred to, these commissioners, or the commissioners jointly with the defendant and not the defendant alone, were the proper parties to be sued. The defendant was allowed to go into evidence to prove the first of these

dilatory defences, and the evidence being concluded, the parties were severally heard, when this COURT disallowed the first defence, being of opinion that it had not been proved that the plaintiffs had so parted with their interest as to disentitle them to sue. But the COURT deferred expressing any opinion upon the second defence, as to the proper party to be sued, until after the case should have been fully gone into on the merits. In addition to the dilatory defences which I have noticed, the defendant further pleaded the general issue, or a denial of all the allegations of fact and conclusions of law stated in the declaration. On the 17th of December the cause was set down for trial, and on the 21st of December the plaintiffs concluded their evidence. The Counsel for the defendant, without going into evidence for the defendant, moved for absolution from the instance, upon two grounds: first, that the indenture of lease did not form a contract between the parties, inferring against the Colonial Government a warranty for undisturbed possession of any ground except that mentioned in the lease, and described by the diagram annexed to it, and that if the plaintiffs had proved disturbance of their possession it was of ground gained from the sea, beyond the boundary of the ground leased, and of the bed of the sea itself, but not of any part of the ground covered by the lease, and so the plaintiffs had failed to support their action by evidence, so far as the action was rested upon a warranty, either expressed in, or to be implied from, the terms of the lease; and not that the action was rested entirely upon the terms of the lease; but the plaintiffs had, nevertheless, gone into evidence to show that the damage done to their works beyond the ground embraced by the lease, had arisen from the carelessness, or unskilfulness, of the engineers and those acting under them, so as to show a liability to the plaintiffs for damage done through the fault of these officers or their servants; but that a liability for a *quasi delict* could lie only against the party who had actually committed the *quasi delict*; and, therefore, although the action might lie against the engineers, or against the Board of Commissioners, who had by statute the supervision of the works and the administration of the funds necessary for their

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erection, it could not lie against the Colonial Government, which had no power to interfere either in the erection of the works, or with the administration of the funds, and so could not have any part in the commission of the *quasi delict*, nor had any funds wherewith to pay the damages occasioned by it. After hearing the Counsel for the parties, THE COURT granted absolution from the instance, upon the first of the grounds upon which it was asked; to wit, that the lease would not support the argument of warranty raised by the plaintiffs; but, on the second point raised for absolution from the instance, which was in truth the second dilatory defence somewhat expanded so as to embrace the question of liability, *quasi ex delicto*, for the damage done, THE COURT refused, in the meanwhile, to grant absolution, being of opinion that this point could be more satisfactorily disposed of after we should have heard the evidence which the defendant had to adduce in answer to the action generally. The cause then proceeded upon the merits, and the plaintiffs' evidence having, as I said, been concluded, that for the defendant was taken. This having been concluded, the cause was set down for argument on the 7th of January, when we had an able one from both sides of the bar; and now we have to determine between the parties upon the merits of the case, and the reserved question as to whether the defendant was the right party to be sued. Before doing so, however, I beg to express what I think my brothers will concur in, my satisfaction with the manner in which the evidence has been got up on either side by the legal advisers of the parties; at their provident foresight of every difficulty which might occur to our minds, and their production of every kind of evidence which was within their reach likely to inform our minds upon the matters in controversy. If there was a fault to find, it might have been with the exuberance of the evidence. Before noticing what the evidence seems to have established, I shall advert to some matters in the history of the breakwater, and of the plaintiffs' slip, which are not unimportant in considering the claim set up by the plaintiffs against the Colonial Government. So early as the year 1855, the construction of a harbour of refuge in Table Bay formed a subject of discussion in the Colonial

Parliament. On the 29th June, 1857, the Colonial Parliament passed an Act, which in its preamble refers to a plan of such a harbour, prepared by Captain Veitch, which, the preamble says, "has in all its main features deservedly met with universal approval in this Colony." That Act provided for the construction of a harbour according to the plan referred to, upon the footing of the Imperial Government defraying the money necessary in the meanwhile, and being afterwards reimbursed by the Colony. The Imperial Government having refused to accede to this arrangement, the Colonial Parliament in June, 1858, passed another Act, whereby, postponing the consideration of a harbour, it authorised the construction of the outer pier or breakwater described in Veitch's plan. This last Act was passed on the 5th of June, 1858. On the 16th of June, 1858, the plaintiffs wrote to the chairman of the Harbour Board of Table Bay, applying for a lease of a piece of ground on the beach, by the shipping yard of Messrs. Bartlett & Co., for the purpose of erecting upon it a patent slip, adding: "We should desire to have the ground granted on a nominal lease, for such a number of years as may be deemed fair." It is obvious, I may observe in passing, that when the plaintiffs wrote this letter they must have been aware of the intended erection of the breakwater. Their letter was answered by the Colonial Secretary on the 17th of July, by a letter in which he asked, "Within what time will you guarantee the erection of the slip if the land should be leased to you, say, for a period of twenty-five years?" In their reply, on the 23rd of July, the plaintiffs suggested that perhaps the Government would be satisfied with a guarantee that the work should be commenced within twelve months, "failing which, the lease to be forfeited; and we respectfully solicit His Excellency's extension of the time to thirty years," suggesting as a reason for this the expensiveness of the work. On the 7th of August, 1858, the Colonial Secretary, on behalf of the Government, acceded to the request of the plaintiffs in both particulars, but suggested, for the consideration of the plaintiffs, whether in the selection of the spot they had chosen they had considered what would be best for their own interest. On 27th of

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August, the plaintiffs wrote to the Colonial Secretary that the work would be impracticable at the spot they had selected and that the only suitable spot would be the one which afterwards formed the subject of the lease on which this action was founded. This sight was nearer to the projected breakwater than the site the plaintiffs first selected; and there is some reason to think, from the evidence of one or two of the witnesses, that protection from the breakwater was at least one of the reasons for this change. On the 2nd of October, the Colonial Secretary wrote to the plaintiffs: "The Governor finds that there is no objection to your erecting the slip on the spot indicated," and, therefore, their application would be acceded to. On 28th of February, 1859, the Colonial Secretary returned to the plaintiffs the draft of a lease which they had sent him on the 18th of February, signifying the Governor's approval of it, subject to an amendment made by the Attorney-General; what that amendment was, does not appear. The plaintiffs then caused the lease to be engrossed in counterpart, and sent it to the Governor for signature; and on the 11th of March, 1859, the Colonial Secretary wrote the plaintiffs that he returned with his letter the lease, dated the 10th of March, and retained the counterpart with the diagram. The lease referred to in these letters is the one on which this action is brought. Such is the history of the circumstances under which the plaintiffs obtained what they themselves originally in their application to the Government, called a "nominal" lease—which in this action they have relied upon as a real lease, but which this Court, by its granting absolution from the instance, so far as the action was founded upon a warranty either expressed in, or to be inferred from the terms of the indenture, has denied to have the character of a lease inferring any liability by the Government, and has affirmed to be no more than a licence by which, for a nominal rent of one shilling per annum, the Government permitted the plaintiffs to have the use of the ground covered by it, to the exclusion of any other member of the community. From this history, it appears that the choice of the ground, and the project of raising a slip upon it, originated entirely with the plaintiffs,—that they made the selection of the site in

the full knowledge that the breakwater was about to be erected in its immediate proximity, and that the scheme had their own private advantage alone in view without corresponding advantage to the Government; for the guarantee as to immediate erection of the slip was evidently intended to prevent the plaintiffs from obtaining the use of the ground, to the exclusion of others, without putting it to a profitable use; and the evidence shows that the use to which the plaintiffs did put the ground was to create as far as possible a monopoly in their own favour, by refusing to every one the use of their slip unless he allowed them to repair the vessels brought upon it. So far, therefore, as injury to the slip from the erection of the breakwater and the works connected with it was unavoidable, or cannot be conclusively proved to have arisen from want of skill or care on the part of the engineers of these works, the plaintiffs had themselves to blame for exposing themselves to this risk, and not selecting another site, or deferring to ask for a site until after the breakwater intended for the "general improvement of the bay" had been erected, and the effect of its erection upon the site they desired to have had been ascertained. I shall now leave the slip for a time, and resume the history of the breakwater. The Act of 1858, in its 2nd section, said: "The Governor shall direct a competent engineer, or engineers, to construct the breakwater." In consequence of this enactment, the Governor, on the 19th of July, 1858, wrote the Secretary for the Colonies, requesting that the Imperial Government would select an engineer-in-chief resident in England, and an engineer to reside in the Colony, "as we have no information to guide us on such subjects." The Secretary for the Colonies referred the question of selection of engineers to the Lords Commissioners of the Admiralty, and they referred it to their own officer, Captain Veitch, who had prepared the original plan of a harbour and breakwater, and he reported: "Mr. John Coode, C.E., is the gentleman, in my opinion, best qualified for engineer-in-chief; and for reasons assigned in the accompanying letter, Mr. Coode should name the person in whom he shall have ample confidence, to be resident engineer at the Cape." The Secretary

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to the Admiralty communicated this to the Secretary for the Colonies, by whom it was approved of, and on the 14th of January, 1859, the Secretary to the Admiralty intimated to the Secretary for the Colonies that, "Mr. Arthur Andrews, C.E., of considerable practice, and possessing the confidence of Mr. Coode, would be well calculated for the office of resident engineer." In consequence of these communications, Mr. Coode received an appointment as resident engineer in London, by letter from Captain Veitch, acting on behalf of the Lords Commissioners of the Admiralty, and on the 22nd of February, 1859, an agreement was entered into between Andrews and the Agents-General for Crown Colonies, whereby Andrews was appointed engineer resident at the Cape. It seems to me that the Government in the mode in which it carried out the direction of the Legislature, as to the employment of competent engineers, did all that could be expected of it; and that it might reasonably calculate that, in the erection of the breakwater, the employment of the best skill and appliances known to modern marine engineering would be secured, considering the magnitude of the marine works which were at that very time being carried on under the superintendence of the Admiralty, and had been carried on for some time previously; still it might be disappointed in this, and the works might be executed with such want of skill, or such want of care as to expose the engineers, or those by whom they may have been employed, or those who may be answerable for their acts, to liability for any damage that may be proved to have arisen to third parties therefrom. In April, 1859 Andrews, arrived in the Colony, and examined the soundings and currents of Table Bay, taking, in doing so, the assistance of Mr. Skead, a master in the Royal Navy, and the Admiralty Surveyor of this coast. Having finished his examination, Andrews returned to England in June, 1859, and laid before Mr. Coode the result of his inquiries. The consequence was that Coode, instead of adopting Veitch's plan in its integrity, which the Act of 1858 directed to be used, prepared a fresh plan of a breakwater only, based, however, on Veitch's plan. In February, 1860, Andrews returned to the Colony with this plan, and with a letter from Mr. Coode, of the 30th of

November, 1859, addressed to the Colonial Secretary here, in which there occurs this passage; "With regard to the question of liability to sitting within the proposed anchorage, this is a point to which I desired Mr. Andrews especially to direct his attention, and all his observations and all replies to his inquiries show, that there is no reason to apprehend any danger of this kind." Another passage in the same letter is in these terms: "Mr. Maclear" (now Sir Thomas Maclear) "has stated that he has been a close observer of the bay for twenty-three years, and did not consider that there was any importance to be attached to the idea that sand travelled from the direction of Salt River; he states also that some rocks on the western side of the bay recently bore the same appearance as they are described to have in the year 1752. We have strong evidence of the absence of any tendency to an accumulation of sand, &c., in the clean surface of the rocks generally along the shore on the western side of the bay." In a subsequent passage Mr. Coode says: "I have come to the conclusion that the best mode of forming the breakwater will be by means of a rough rubble moored, the experience of the Portland works, especially during recent and unusually severe gales, has proved the sufficiency and stability of a rough stone bank, without masonry superstructure or casing of any kind." The consequence of this letter, and of information communicated by Andrews personally, seems to have been the passing of the Act of 1860, which authorized the construction of the breakwater, according to the new plan prepared by Coode. Moreover, the Act authorized the governor to appoint a Board of seven Commissioners to "supervise the construction of the breakwater, and to administer all and singular the properties, funds, dues, revenues, and moneys" mentioned in the Act of 1858. By the terms of the plaintiffs' licence they were bound to commence the erection of their slip within twelve months after the 10th of March, 1859; but, however, they might have been otherwise engaged in the meanwhile, they did not actually commence their works even on the land, till the month of February, 1860, and they must have been aware of Coode's plan; nor did they even examine the site seaward until the month of January,

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1861. This latter delay, at least after the 6th of March, 1860, does not seem attributable to the plaintiffs, for on the 6th of March, 1860, the Colonial Secretary wrote them that, as Mr. Coode's plan embraced their ground, "it will be necessary to resume possession of this land, giving you other suitable land in exchange, or otherwise compensating you," and he added, "As His Excellency is informed that you did not commence any work upon this ground until the 10th ultimo, he trusts that by this timely notice, the expenditure upon it, which cannot be turned to account for harbour works, will have been insignificant." On the 7th of March the plaintiffs wrote the Colonial Secretary: "We admit that we must give way to the interest of the public service, and have every confidence that Government will give us a fair compensation." The Act of 1860 was passed on the 17th of July. On the 31st the Colonial Secretary wrote the plaintiffs that the Government would require possession of their ground, and was prepared to compensate them for any expenses they might have been put to, and for any damage they were likely to sustain, and would also take over at a valuation the plant and materials imported by them. On the 7th of August the plaintiffs wrote to the Colonial Secretary that, judging from their experience with their slip at Simon's Town, they felt warranted in estimating the profits which they would have made in Table Bay, had they been allowed to erect the slip there, at the rate of £2,000 sterling per annum; they, therefore, submitted that the damage for which they "ought to be compensated, ought to be calculated according to the same for the period of the lease," but they did not, in their letter, make any reference to the offer of the Government to give them suitable ground elsewhere. This letter of the plaintiffs seems, from a jotting on the back of it by the Attorney-General, to have been understood as a demand for £60,000 of damages, and either because of the largeness of that sum, or for some other reason, it was not answered by the Government. On the 17th of October, 1860, Messrs. Reid, as attorneys for the plaintiffs, wrote the Colonial Secretary, recapitulating the letter of the plaintiffs of the 7th of August, and concluding, "As they have received no

reply to this communication, they beg to state that they must conclude that the contract is in force, and therefore will proceed to construct the slip." This was putting it in this way:—Either we must have such compensation as we have asked, or we will erect our slip on the site we have chosen, notwithstanding the intention to erect the breakwater in its immediate proximity. On the 16th of November, the Colonial Secretary wrote Messrs. Reid that the claim preferred by the plaintiffs appeared to the Governor to be of such a nature as to preclude the Government from entertaining it, and that the negotiation for the resumption of the ground was, therefore, to be considered at an end; and it was proved before us, that the Government, in consequence of the interruption occasioned by the slip works, had to make a deep cutting behind these works, at a cost of several thousand pounds. At the conclusion of this correspondence, the plaintiffs resumed their works. In January, 1861, and not till then, they took soundings, and examined the site of the slip seawards. In August, 1861, Parliament passed the Act No. 16 of that year, which authorized the construction of docks as well as of breakwater. About August, 1862, the slip was finally completed, and soon after the plaintiffs commenced business by taking up ships upon it. In September, 1862, the plaintiffs took up a vessel called the *Ceres*, apparently without any difficulty. But Mr. Mair, the engineer of the plaintiffs, swears that when the vessel was being launched again she stuck fast at the stem while afloat at the stern, although a vessel of only 91 tons burthen. This he attributed to a collection of sand upon the slip, at its extreme end, according to the information he received at the time from divers, whom he sent down on the 9th and 10th of September. Their statement was that 130 feet of the extreme end of the slip was covered with sand 12 inches deep. As the vessel went on to the slip stem foremost, and of course came off it stern foremost, one would have expected that if she floated at the stern, as she came off, she would certainly float at the stem when she got into the water, vessels being trimmed for the slip to draw more water at the stern than at the stem. However that may be, such was the account given by Mair. On the

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23rd of September, divers were sent down again. They reported this time that the length of the silt was reduced from 130 feet to 40 feet. On the 22nd of October, divers were again sent down, and they reported that the silt had increased from 40 feet to between 50 and 60 feet. The existence of this silt did not prevent the plaintiffs from taking up, on the 23rd of September, the *St. Olaf*, of 450 tons burthen, and on the 22nd of October, the *Coonanbara*, of 765 tons burthen. Mair swears that there was no other interruption on the ways at that time. Nevertheless, apparently in anticipation of what did occur, and of something worse which might occur, he made a written report to the plaintiffs, "that a considerable deposit of sand and soil from the breakwater works is in process of collection on the rails of the slip, to the distance of about 130 feet from the sea end, and is daily increasing." This latter statement, however, was inaccurate, as the evidence of the divers to which I have referred shows. This written report of Mair to the plaintiffs, his employers, does not seem to have produced any complaint, written or verbal, from the plaintiffs, either to the Government or to the Board of Commissioners, who had been appointed by the Governor under the Act of 1860 to supervise the construction of the breakwater. Nay, more, the plaintiffs continued to take up vessels throughout the remainder of 1862, and up to the 3rd of May, 1863. During all this time, according to the evidence of Mair, the plaintiffs were not stopped as to any of the vessels they took up. To be sure Mair says the vessels were small, and did not require to have the cradle put far down for them. Mair swears that during all this time the silt was 60 feet in length, from the sea end of the slip, and that in June it was 70 feet in length; he also swears that on the north side rail (the side rails not going so far into the sea as the centre rail) there was also a bank of sand of from 20 to 30 feet in length, and from 3 to 4 inches above the rail, and he produced a model exhibiting this last shoal at about half-way up the slip. These two shoals, he swore, had existed from September, 1862. In the month of June, 1863, the steamer *Norman* had to be got up on the slip, and Mair swears that they experienced difficulty in

getting her up over the upper shoal; that in launching her they had to get up steam, and employ her screw as soon as it got into the water to draw her off the slip, as the cradle would not go far enough down. Mair further swore that on the 27th of June he sent divers down, when he found the upper shoal was 3 inches in depth and the lower one 70 feet long; that on the 3rd of July he again sent divers down, and found that the inner shoal was 4 inches deep and 30 feet long, and that the lower shoal was 85 feet in length. Nevertheless the plaintiffs continued taking up vessels for the public, the last of them being the *Admiral Jervis*, which was taken up on the 4th of July, 1863. After the 4th of July, but on what particular day does not appear, the plaintiffs resolved on taking up a hulk called the *Tetuan*, their own property, which they were about to break up. This vessel drew 7 feet forward and 11 feet aft. The plaintiffs had difficulty in getting the cradle down to her, but they did get it down, and, according to the evidence of Mair and of Spence, they succeeded in getting the vessel fair upon the cradle, although her length was 140 feet; but while she was being hauled up on the cradle she fell over to the port side, tilted up the centre way of the slip, and broke down through the arms of the slip. Mair was asked why she tumbled over? and he answered, "It would be difficult to say why she did so, but it was likely that the cradle had run off the ways at the lower end, and when it came to the bank itself it got worse." As the case of the *Tetuan* was much dwelt upon by the plaintiffs in the evidence, apparently with the view of its fall being understood to have been occasioned by the silt upon the slip, this was a very unsatisfactory answer, to say the least, coming from a witness in the position of Mair. On the 18th of July Mair resumed his examinations of the lower shoal by divers; he then found it 90 feet long and 20 inches deep at the extreme end of the north rail, 15 inches at the end of the centre rail, and 10 inches at the end of the south rail. He again examined on the 24th and 31st of July, and found matters little changed from what they had been on the 18th. Why he did not on these occasions extend his inquiry to the upper shoal does not appear. It was probably after

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this that the *Tetuan* was taken up; for it was said that she lay upon the slip for three weeks just as she fell over, during which time she was broken up, and when Mair again examined by divers, which was on the 24th of August, he found the upper shoal reduced to the level of the rails. On this occasion he continued his inquiry to the upper shoal. On the 10th and 17th of December Mair again sent down divers and examined both shoals. The result was that the lower shoal was now found to be 80 feet long and 14 inches deep at the end of the centre and of the north rails, and 12 inches at the end of the south rail; but the middle shoal had so far disappeared that the sand where it had been was now 12 inches below the top of the rails." What I have given is the account of Mair, the plaintiffs' own witness and engineer, in regard to these two shoals. Mair also swore that occasionally stones had been washed up on the beach at the root of the slip, but these had been always cleared away and had never been allowed to form an obstacle in getting up the ships; but since August, 1863, this process of removal seems to have been discontinued, for there is now a bank at the root of the slip and above high-water mark, and running right over it, 50 feet in length and 4 or 5 feet deep. This bank, it was said by the defendant, and I believe with truth, was not in existence when this action was first brought—at least the statement was not contradicted by the plaintiffs. These three shoals are the matters complained of by the plaintiffs as causing the damage, which entitles them to claim from the Government that the Government shall remove them, and also pay the plaintiffs £250 per month since July, 1863, or otherwise pay them £20,000 of damages. The grounds upon which these claims are rested are that the three different shoals have been created entirely by matter brought from the works of the breakwater. These works consist of four different divisions:—1st. Of ground gained from the sea, on the shore immediately adjoining the slip ground, to the northward of it; 2nd. Of a groin or south arm, thrown out professedly for the purpose of retaining matter travelling wherever it might come from, still further northward; 3rd. Of the breakwater proper itself; and 4th. Of ground reclaimed from the sea

to the northward of the breakwater, this latter work being the most distant from the slip; and the allegation of the plaintiffs is that these works have been so constructed—in the language of the declaration, “carelessly, negligently, wrongfully, and unskilfully”—as to cause the collection of these three shoals upon the works of the slip. These expressions of the declaration have been explained by the evidence to mean that in executing the different works connected with the breakwater which I have mentioned, the engineers employed in these works, instead of using stone alone and no other matter, or using other matter but always fencing it beforehand with stone to the seaward, had thrown into the sea the surface soil which lay upon the rocks about to be excavated, without regard to what that soil might be composed of. And evidence was adduced tending to show that that surface soil had consisted of earth, clay, sand, calcareous tufa, and a conglomerate of shell and sand; and that a considerable portion of the rock excavated consisted not of true clay-slate, the great substratum of the excavation, but of decomposed clay-slate, a soft stone liable to be worn away by attrition; that the action of the currents in the sea, whether existing originally or created by the force of the winds, was to carry in suspension the loose matter thus thrown into the sea, and deposit it upon the inner and outer shoals at the slip, and also to throw up the bank of stones which had been from time to time accumulated at the root of the slip, and has latterly been allowed permanently to form there. In support of these allegations a great deal of evidence was adduced to show that the currents in Table Bay were chiefly due to the action of the winds, and that the effect of north-westerly gales was to wash out the works of the breakwater, which are all to the north of the slip, and to carry the matter washed out towards that work; and various samples of sand, some taken from the shoals upon the slip, some from the shore to the south of the slip, and some from the shore to the north of the slip, were produced in order to prove, if I understand the matter, that the sand found upon the slip must have come from the works of the breakwater, because there had existed in the surface soil taken for the purposes of the breakwater works,

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substances from which the sand found on the slip could be eliminated by the action of the sea upon the general mass. The plaintiffs examined several witnesses, to prove the strength of their allegation in regard to the method in which the breakwater works had been constructed; but their Counsel in summing up addresses his attention chiefly to the reports which Mr. Andrews, the resident engineer of the breakwater, had half-yearly submitted to the Harbour Commissioners, on the assumption that these reports substantially confirmed the evidence of the plaintiffs' witnesses. I have since read these reports with great care, and after doing so, I have not been able to arrive at that conclusion. In the report of the 16th of January, 1861, Mr. Andrews says, about "15,000 yards cube of soil has been excavated and deposited on the shore of the bay, extending about 70 feet outwards from high-water mark. This will form a portion of the land proposed to be reclaimed, and also the root end of the breakwater." These words, it was supposed, proved that 15,000 yards of earth, was meant 15,000 yards of "soil," and that quantity of earth had been thrown into the sea, and this was said to be confirmed by the paragraph which follows: "The best stones in this excavation are selected for building the boundary walls," &c. But this is to mis-read these passages, for the first says that soil has been "excavated," and the second says the best stones "in this excavation" are selected, showing plainly that the excavation embraced stones as well as earth, and the word "soil" was meant to include stones. It was further argued that the second paragraph showed that the stones were selected from the soil, and were used for building instead of being thrown into the sea; but Mr. Andrews, on examination, said that he meant by these words the best stones for building were selected, and it seems to me that that is the correct reading of the passage. It was further argued that the words, "outwards from high-water mark" showed that the soil had been thrown into the sea at right angles from the shore; but Mr. Andrews, in examination, said, that though the words might bear that meaning, it was not the meaning he intended to convey; that by seawards and outwards he meant to express a direction from the

breakwater towards the ocean, or a northerly direction along the shore outwards to the ocean; and when the members of the Court visited the works, it was evident that a very large extent of ground indeed has been gained from the sea by depositing stone and earth along the shore in a northerly direction, and not out from it. And the words in the passage of the report relied on by the plaintiffs "this," *i.e.* the soil thrown in, "will form a portion of the land proposed to be reclaimed, and also the root end of the breakwater," seem to show that it referred to this esplanade, and not to the esplanade immediately adjoining the slip, or the south arm or groin projected between the root of the breakwater and the slip; and this is confirmed by the statement in the report of 1st of July, 1862, to be presently noticed. These observations make it unnecessary for me to comment on the words in Mr. Andrew's report of the 6th of July, 1861, "We have moved about 51,000 cubic yards of stone and soil, the former being used for ballast or building purposes, and the latter run to seawards to form the root end of the breakwater." In his report of the 1st of July, 1862, Mr. Andrews stated that the works had been visited by a severe gale of wind for seventeen days, that a large quantity of soil and small stones which he had run out "north of the staging for the purpose of reclaiming land" had been washed away. This, it was supposed, also proved that earth and loose matter had been thrown into the sea, to the damage of plaintiffs' work, but as no "staging" was used except upon the breakwater, the word "staging" shows that the loose matter here spoken of and also that spoken of in the report of January, 1861, had been thrown upon the shore to the northward of the root of the breakwater, to make the reclamation of land to which I have before adverted. Before this loose matter could have reached the work of the plaintiffs, it must have been carried in suspension along the north side of the breakwater, round its extreme end, along the distance between the breakwater and the south arm; round the extremity of the south arm, and then along the distance between the south arm and the slip. The supposition of this as being one cause of the shoal upon the slip, seems to be too extravagant to require comment, nor was

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this argued by the plaintiffs. Their contention was that the earth referred to in these reports was thrown in at the esplanade immediately adjoining their slip; but as I have observed, this does not seem to me to be the fair inference deducible from the expression of the reports. I do not think it necessary to notice these reports further, even if they could be considered to prove as facts what is stated in them, which I think very doubtful; they do not do so to the extent to which the plaintiffs urged that they did. I have, however, carefully considered the evidence adduced by the witnesses examined for both parties, upon the question as to the mode in which the breakwater works have been constructed. The witnesses for the defendant were the engineers actually engaged in the construction of the works, and present upon them constantly, while the witnesses for the plaintiffs were persons who had occupations to attend to of their own, and merely looked at the breakwater works occasionally. Unless I am to consider the witnesses for the defendant as having deliberately foresworn themselves, I must take the fact to be, that the breakwater works were constructed in a manner to prevent the sea from washing out matters thrown down, according to the methods best known to marine engineering skill, and that where the sea did succeed in washing out any part of the materials and carrying them to the slip, it was against the wishes of those employed in advising the construction of the works, contrary to their expectations after inquiry and investigation, as shown in the passage of Coode's letter of the 29th of November, 1859, which I before quoted, and in spite of the contrivances used by them to prevent it so far as their knowledge of the unseen action of the sea enabled them to form an opinion beforehand of what was necessary. If, in the circumstances of the case, I felt myself called upon to say what from the evidence was the cause as a matter of fact of the accumulation of the two shoals upon the plaintiffs' slip, I should feel unable to do so. The evidence for the plaintiffs as to the direction and force of the currents in the bay is in direct conflict with the evidence on that subject for the defendant, and I do not feel myself in a position to say which of the theories of these two classes of persons

is the correct one. The theory of the plaintiffs' witnesses is that the north-west gales create a current running with the wind, which would carry along the shore towards the south-east, i.e. the works of their slip, everything which by the force of the waves might be washed out of the break-water works, which are to the north-west of the slip. The theory of the defendant's witnesses on the other hand is that there is a continual current, independent of the winds setting into the bay, which impinges upon the Salt River shore at the head of the bay, where it is divided into two currents, one of which passes along the shore opposite Cape Town, and out along the shore on which these several works are placed, and that the effect of this current is to scour out the southern side of all solid structures built into the sea, and to form a silt or deposit on their northern side. According to both of these theories one would expect to find a silting, or a collection of sand, beginning at the north side, or the root of the plaintiffs' slip, extending more or less along its face on that northern side. Such was sworn to be the state of matters at the south jetty, the central jetty, the north jetty, and the coaling jetty. But such is not the state of matters at the slip, nor at the ribs of rocks which, in the neighbourhood of the slip run out into the sea perpendicularly to the shore. At the root of the slip there is a bank of shingle thrown up, not along the north side of the slip, but right across it, for a length of 50 yards at right angles to the slip. Between that bank of shingle there is a space of 100 feet upon which there is no accumulation of either sand or shingle. Then comes the position where was at one time the upper shoal, which was at one time of a longitudinal form, and lay not along, but in a direction almost at right angles with the slip, one of its ends only just touching the north side of the slip to a depth of 4 inches, but which has since disappeared, at least has so much decreased that it is now 12 inches below the level of the slip. Then comes a space of 120 feet, in which there is no deposit along the north side of the slip. This brings us to the outer shoal which is as near as possible of the form of a painter's pallet, and lies right across the slip, the part where the painter's thumb goes in being

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opposite the north side of the slip, but at a distance of 60 feet from it. And the rocks running out into the sea, remain, as Mr. Coode in his letter of November, 1859, says Sir Thomas Maclear described them as having been since 1752, *i.e.* free of sand. Neither of the theories of the plaintiffs' and of the defendant's witnesses accounts for or explains this state of circumstances; and in the absence of such explanation, I feel myself unable to say what force it was, or rather what direction the force came from, which deposited the material of which these two shoals are composed at the points at which they were found. With regard to the substance of which these shoals were composed, the theory of the plaintiffs' witnesses was, that soft materials composed of earth, clay, sand, shell, and dust, or attrition of decomposed clay-slate, having been thrown into the sea at the breakwater works, these loose matters had been washed out by the sea, and then a process took place, which may be shortly described in the words of the witness Fairbridge, "the clay will dissolve and disappear, the silica and sand will fall to the bottom, and the shells and lime will be carried away, till they meet with still water, when they will be deposited." This process is to be accomplished by the force of a northern current. It is not said where the clay disappears to. If it had been said such earthy matter was dissolved, or rather separated from the matters with which it had been in combination, and was carried in suspension till it came to still water, where its specific gravity induced its deposit, that would be consistent with one's experience and knowledge of such matters; but that clay should be said simply to disappear without accounting for it otherwise, is not intelligible to my mind. But the omission may be accounted for by the circumstance that no mud is found upon either of the slip shoals; and yet when we visited the works in fair weather with still water, earthy matter was being carried in suspension at the extreme north works, where soil was at that time being thrown in along the shore in continuation of the work mentioned in Andrew's reports before adverted to: If the plaintiffs' theory of a current carrying matter in suspension be correct, it assumes that there was still water

at the two points on the slip where the two shoals were formed, without accounting for why this should be. One could understand why the water should be stiller along the side of the slip towards its root where the structure of the slip is some feet higher than the bottom of the sea, and therefore might be supposed to interrupt the supposed current; but the upper shoal began 100 feet from the upper part of the slip, and the lower shoal at a distance of 120 feet from the upper one, and where the elevation of the slip is comparatively slight, and yet this lower shoal is by far the larger of the two. What should have disturbed the water between the shoals? And if the wave theory be resorted to, how is it that no shells or sand are washed up either at the root of the slip, or in the interval between it and the first shoal, or between the two shoals? The substance of these shoals is composed of sand, small shells, and stones, but chiefly of sand. According to the evidence of Schmieterloew, he says one-third was minute shell, and two-thirds sand. If only shell came from the breakwater, then these questions suggest themselves, where did the earthy matter go to? And if the sand from the breakwater works fell to the bottom, leaving the shells to be carried in suspension, then where did the two-thirds of sand spoken of by Schmieterloew come from? Mair says that before he began the slip, he examined the bottom of the site, and that while it was rocky in shore, at the extremity it was sand lying on a deposit of shingle. It would seem, therefore, that there was a tendency for sand to accumulate at this spot before the slip was laid down, and it is just possible that the laying down of the slip may have increased that tendency, and so have produced the shoal, independently of the breakwater works. The composition of the shoal will not elucidate where its substance came from, because it is of the same nature with the sand found both to the north and to the south of the slip works; it is identically the same, with this exception, that its particles are more comminuted, and no evidence was given to show why they should be so if they came from the breakwater works, more than if they came from any other quarter. Nay, more, there was strong evidence on the part of the de-

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fendant, to show that the plaintiffs in constructing their slip had followed the exact course which they complained that the makers of the breakwater had pursued. Two or three persons who had been employed upon the slip works swore that the top soil taken from the excavations for the slip shore works, and for the construction of an ice-house built by the plaintiffs, had been thrown into the sea just as it came to hand, that top soil being in consistency pretty much the same as the top soil taken from the breakwater works; so that it is just possible that the shoals may, in part at least, be attributable to the works of the plaintiffs themselves. With regard to the shoal of shingle lying above high-water mark across the slip, and extending from it on either side to some distance, the evidence, as well as my own personal inspection, satisfied me that, as contended by the plaintiffs, it was not pure sea shingle, or stones rounded by long exposure to the action of the sea; but, though composed greatly of pure shingle, it was more or less intermixed with stones that had come from the shore, at a more or less recent period. But though it was quite possible that these stones, or some of them, may have come from the esplanade formed by the breakwater works,—because it is undoubted that the sea had in gales of wind washed down the face of that esplanade in several places so as to increase its slope considerably, and the wash of the waves may have removed some of the stones as far as this part of the beach,—yet it is quite possible that some of these fresh stones may also have come from the slip works themselves; for Mr. Mair in his evidence admitted that, through the force of the sea, the stones packed between the ways of the slip had frequently been washed up, and the divers who examined the slip shortly before the case was heard found the packing of the slip disturbed to a distance of 70 feet, in some places to a greater extent than others; and Bremner, the diver sent down by the direction of the Court after the evidence for the parties had been concluded, swore that he found a space to the extent of 10 feet in which the packing had been more or less washed out; but unfortunately he was not able, by reason of the heavy rollers which had set in after he went down, to follow his

directions to proceed along the slip towards the shore, in order to trace how much further the packing might have been disturbed; but my own observations from the shore at the time these directions were given, satisfied me that if the rollers had not prevented the diver coming towards the shore, he would have found a much greater extent of disturbance than that which he swore to; for just within the wash of the sea there were two large masses of stone, if not more, which had evidently been displaced from their original position, whose surface projected somewhat above the level of the rails, and as the waves receded they disclosed the sand underneath the ways at a level below the underneath side of the ways and that the packing at that point had almost been entirely washed out. The intention of the directions given to the diver was, among other things, to discover whether the displacement of the material had been such as to throw the ways out of their level; but the rollers prevented the discovery of this also. However, even if the rollers had not prevented this inquiry, the inquiry would have proved fruitless, for it was stated from the bar that the slip had been repaired since the fall of the *Tetuan*, and that one of the repairs was in the readjustment of the ways, and yet after this readjustment the displacement of the packing was such as I have already adverted to. It is impossible for me, therefore, to say that the evidence established to my mind satisfactorily that the stones composing this bank came from the breakwater works alone. More than one witness swore that before the slip or breakwater works were thought of there was a shingle bank here. There was, therefore, a tendency to the deposit of shingle at this spot; and though the deposit has latterly been to a greater depth than had been perceived by casual observers, it is quite possible that the deposit may have been as great at former periods from natural and not artificial causes, and that the deposit in the present instance may also have arisen from natural causes, and that the addition of stones, not being true shingle, may have arisen from these stones having come either from the slip works or from the breakwater works to the place where the true shingle was at the time when the sea began to drive it up on the beach. Upon a review of

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the evidence, I do not find myself able to say that it has been proved satisfactorily, as a matter of fact, that any of the three shoals has been formed of matter which has been brought from the breakwater works and from nowhere else. It has been said for the plaintiffs that they had proved that matter had been thrown from the breakwater works which could be washed out by the sea, and that shoals had simultaneously with this been formed on their slip; and therefore in taking this in conjunction with what they alleged they had proved in regard to the currents, they had proved all that could reasonably be required of them to show that these shoals had come from the breakwater; but as I do not find myself, for the reasons I have given, in a position to admit the premise, I cannot allow the conclusion drawn from it. In order to make the Government liable, it must be proved, without doubt or hesitation, not only that the materials of which the shoals are composed came from the breakwater, but that they so came because of unskilful and negligent conduct on the part of the engineers in the way in which they constructed the breakwater works. This is the case which the plaintiffs have undertaken to make out, and which they must establish before any liability can be made to attach to the Government. The action of the sea upon artificial structures is so anomalous and contradictory in one situation as compared with another, and seems to be so much dependent upon forces and opposing forces which are necessarily invisible to the human eye, that it would be very difficult to come to any conclusion as to what really was the cause of the shoals in this particular instance without the production of much stronger evidence than the plaintiffs have been able to adduce, even after all the care and labour which their advisers have evidently bestowed upon it; and considering the relative position of the parties, and the circumstances under which the site for the slip was chosen and adhered to, that the plaintiffs are not entitled to have any presumption raised in their favour, or to have the benefit of anything beyond what they have effectually proved. This view which I take of the case is much aided by consideration of the law applicable to it. Where there are two conterminous proprietors of land, each

may do upon his land what he thinks will contribute to its improvement, or to his own pleasure or advantage, even though what he does should occasion injury to his neighbour, if without what he does he could not have the full enjoyment of his natural right of property, or if he do it without the knowledge that it will do injury to his neighbour, and such injury be not the motive to the operation. The language of the Digest is (30, 3, 12), "*Aquam pluviam in suo retinere vel superficientem ex vicine in suum derivare dum opus in alieno non fiat omnibus jus esse*," Every one has the right to retain the rain-water on his own ground, or to draw off the surface water from the neighbouring ground into his own, so long as he does not do anything upon the neighbouring ground. "*Prodesse enim sibi unusquisque num alii non nocet non prohibetur*," For no one can be prevented from benefiting himself so long as he does not injure another. "*Cum eo qui in suo fodicus vicine fontem avertit nihil posse agi ; nec de dolo actionem et sane non debet habere si non animo vicino nocendi sed suum agrum meliorem faciendi id fecit*," Nothing can be done to him who, digging in his own ground, draws away the fountain of his neighbour ; nor can he, nor ought he, to be liable to the action *de dolo* if what he has done was done not with the design to injure his neighbour, but with the intention to improve his own ground. And in Digest 50, 17, 151, it is said, "*Nemo damnum facit nisi qui id fecit quod facere jus non habet*," No one does damage unless he do what he has no right to do ; and again "*Non videtur vim facere qui jura suo utitur et ordinaria actione experitur*," He does not seem to have done wrong who has exercised right, and has used the ordinary mode in doing so. If, then, the Government and the proprietors of land, and the operations of the Government (that is, assuming for the present these operations to be the operations of the Government) at the breakwater were supposed to be on the land (without the sea and the rights which arise with regard to it being taken into account), the Government could not be made liable for any injury the operations might have occasioned to the slip, the object of the operations being not to injure the slip, but to benefit or improve the ground of the Government, and even

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ultimately to protect the slip itself. No doubt, if the motive of the operations was the injury of the slip, the circumstance of their being upon the Government ground, and the accident of their improving that ground, would not protect the Government from liability for any damage that might arise to the slip from operations which, in such a case, would be malicious in character; but there has not appeared from any part of the evidence laid before us, the slightest suggestion of an intention on the part of the Government, or of anybody else, whether acting under the Government, or independently of it, to injure the slip in any respect. On the contrary, the evidence is most satisfactory that whether the engineers and those employed by them may or may not have succeeded in protecting the slip from injury, their intention was to do so. Andrews, before going to England, in 1862, left written instructions with Sheppard, who was to take his place in his absence, in which there is the following passage: "Guard against doing any damage to the slip, and build up the stone on the side next them." This direction was given at a time when the present action could not have been dreamt of by Andrews; but, indeed, there was no suggestion even from the Bar of any intention on the part of anybody to injure the slip, and therefore that notion may be dismissed without further observation. A passage, however, was referred to from *Voet*, 9, 2, 14, showing that liability for damage might be incurred, from acts done imprudently or unskilfully while engaged in a lawful occupation; but there is no evidence of imprudence on the part of the Government. The only imprudence it could have exhibited could have been in the selection of the engineer, or engineers whom, by the 2nd section of the Act of 1858, the Governor was "to direct" to construct the breakwater. I have already shown that the Governor, confessing his own ignorance of such matters, addressed himself to the Home Government, and through it obtained the selection of Mr. Cooke as, in the opinion of the Lords of the Admiralty, the person "best qualified" for the office of engineer-in-chief, and through Mr. Cooke, the appointment of Mr. Andrews as a person "well calculated," in his opinion, to be the active engineer resident within the Colony. It is difficult to see,

therefore, what more the Government could have done towards securing the services of persons best qualified to direct the intended operations. With regard to any omission to use the skill of which the engineers may be assumed to have been possessed, the Government could be answerable for that only upon the assumption that it was answerable for the acts of the engineers employed by it. That it is so answerable, I will assume for the present. Four civil engineers, of considerable practical experience in these matters, concurred in giving their opinion that the breakwater works had been "practically and skilfully" executed, according to the best principles recognised in submarine engineering, and the presumption is that they would be so executed from the selection of the officers to direct them having been made by the highest authorities at home in these matters to whom the Colonial Government could address itself. It was said no doubt for the plaintiffs, and with truth, that these engineers gave their opinions after a review of the works as they exhibit themselves at present, but that these gentlemen had no opportunity of seeing from time to time how the work had been carried on. It is equally true that there is some conflict between the evidence for the plaintiffs and the evidence for the defendant in regard to whether the matter thrown seaward was constantly kept fenced as it progressed by large stone facing, to prevent the action of the sea washing out the small material; but to my mind the weight of evidence satisfied me that if the outer facing was not always kept fenced, this was the case only at the esplanades to the north of the slip, and to the north of the breakwater; and admitting it to have actually taken place, I cannot think that doing so necessarily inferred a want of skill on the part of the engineers, or such a want of skill as should make either the engineers or those who employed them liable for any accumulation of silt at the slip which might be supposed to have arisen from this mode of gaining land from the sea, if it were proved to have so arisen, but which, in my opinion, has not been proved, for the reasons I have already given—the evidence for the plaintiffs was not directed to the mode in which the esplanade to the north of the breakwater had been formed;

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it was confined to the esplanade immediately to the north of the slip. Some of their witnesses no doubt said that they had observed from time to time, from casually looking at the work, loose materials thrown out without any stone facing seawards; but opposed to this there is the positive evidence of Andrews that that esplanade had not reached high-water mark when he left the colony for England. I have already referred to a passage in Andrews' written instructions to Sheppard, in which he directed him, in constructing this esplanade, to guard against doing any damage to the slip works, and to build up the stone on the side next them. Sheppard swore distinctly that he observed implicitly the written instructions Andrews left, that the port completed by Andrews had not reached high-water, and that after it reached high-water under his management he had large stones thrown forward to protect from the wash of the sea, and that the side to the sea always had the protection of the largest stones he could procure. I cannot bring myself to disbelieve the positive and direct evidence of persons so respectable in regard to matters in which they were personally and immediately employed, on the strength of the evidence given by persons who, however equally respectable they may be, were necessarily but casual observers, and must trust considerably to memory for what they now give as to what they saw. If, therefore, it should be considered as having been proved that the shoals of the slip came from the breakwater, which I am of opinion has not been proved, I have seen no evidence to prove that this arose from failure to use the skill requisite in the construction of such works, or that the engineers, exercising reasonable skill in their profession, were bound to be aware that if they did throw matter into the sea in the manner in which the plaintiffs' witnesses allege that they did, the loose matter washed out would inevitably be carried to the slip works, and that they were, therefore, culpably negligent in what they are alleged to have done. Mr. Coode's letter of November, 1859, to which I have already twice alluded, shows that both he and Andrews were of opinion that matter would not be carried by the sea. The evidence has not satisfied me even yet that that opinion was erroneous; but

even if experience should have shown that it was erroneous, it does not follow that liability will result. It must next be shown that the engineers could and ought to have known this beforehand, or were culpably negligent in not putting themselves in the way of knowing it. In the case of *Penhallow vs. The Mersey Docks and Harbour Board* (a), Chief Baron Pollock charged the Jury that if the defendants had the means of knowing the state of the dock, and "were negligently ignorant of it," they were liable. This direction of the Chief Baron was affirmed by the full Court, and the converse of the proposition which it enunciates seems to be that which is applicable to the present case,—namely, if the engineers neither knew that loose matter washed into the sea would inevitably silt up upon the slip, nor negligently failed to avail themselves of any means within their reach for gaining that information, they cannot be liable. There is no evidence, in my opinion, as a matter of fact, that matter did come from the breakwater to the slip, and still less is there evidence as matter of theory or of physical certainty that matter would travel from the breakwater to the slip, or that the engineers were negligently ignorant of what would have taught them to expect that this would happen. The letter of Coode of 30th November, 1859, shows that every inquiry had been made as to the action of the sea within the bay before anything was done, and that the opinion of both Coode and Andrews was then, that matter did not travel either from the one side or from the other of the site of the intended works. The engineers acting *bonâ fide* were entitled to rely upon this opinion so long as experience did not show them that it was erroneous. And even if the conflict in the evidence as to the manner in which materials were thrown into the sea were to be decided in favour of the plaintiffs, the evidence shows that that was discontinued so soon as it was discovered that it was mischievous; at least it is far from showing that it was continued with a reckless disregard of consequences, amounting in law to *malitia*. I have as yet considered this part of the case on the supposition that

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(a) 29 L. J. Ex. 21.

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the plaintiffs were conterminous proprietors with the defendants; but this is not so. The plaintiffs, as this Court has already found, were, with regard to the ground embraced by the instrument, "nominally" a lease, only licensees of the Government. They merely had a license from the Government to use the area covered by the instrument for a period of thirty years. With regard to the ground between that area and the sea, which has been recovered from the sea, possibly the license would equitably extend to it; but with regard to the sea-shore between high and low-water mark, and to the erections below low-water mark, the plaintiffs are without any title whatever. It was not within the power of the Governor to extend the license to these latter; the Parliament alone within the Colony could give a title to interfere with anything below high-water mark. No doubt the Digest says, "*Adversus eum qui molem in mare projectit interdictum utile competit ei cui forte hæc res nociturus sit, si autem nemo damnum sentit, mendus est is qui in littore ædificat vel molem in mare jacet,*" An interdict is competent against him who throws out a mole into the sea by him who may be thereby injured; but if nobody suffer damage, he is to be protected who either builds on the shore, or throws out a mole into the sea. However much this negative right of protection might entitle the plaintiffs to apply for an interdict against any direct immediate active interference with their works, I cannot think it gives them an active title either to interfere by interdict with the construction of works ordered by the super-eminent authority of Parliament—for to this extent their argument must go—or to claim damages for any injury, real or supposed, as arising from the manner in which that work had been executed, without proving demonstrably that the damage was occasioned by the manner in which the work had been executed, and that it might have been avoided by the adoption of another mode of execution, equally effective and inexpensive. The plaintiffs chose the site of their works with a perfect knowledge that these breakwater works were to be carried out, and they acceded to the offer of the Government for resumption of the ground embraced by their license only upon such terms as, from their exorbitancy,

amounted to a refusal. Even if the plaintiffs had been tenants instead of licensees, it was in the power of the Government to have resumed possession of the ground contained in their license, without giving them further compensation than the remission of the yearly payment of one shilling, and perhaps, in the particular circumstances of the case, for any expenses they might have incurred toward the erection of the slip. This it was competent for the Government to have done, independently of the 9th section of the Act of 1858, which it was supposed (rightly or wrongly matters not) had ceased to have operation, as the Act was intended to apply to the superseded plan of Captain Veitch. *Voet*, 9, 2, 16, says: "Although regularly the tenant cannot be removed from a house or from land before the time fixed by the hiring, yet there are many cases in which this is allowed, and so that the value to the tenant put out will not have to be paid either by the party putting him out or by any other, but only the rent for the time to come, during which he has not the use of the thing let, but must be remitted." One instance he gives of this is where the landlord proves that the house let is necessary for his own use, by reason of newly emerging circumstances. Here the reason given by the Government for the proposed resumption of the slip-ground was, that the ground was found to be necessary for the laying down of a railway from the breakwater to the harbour, and the Government offered to pay all the expenses which the plaintiffs had incurred, and to give them another site for their slip, or to take the plant which they had purchased, at a valuation; but the plaintiffs put forward a claim for the profits which they might have earned, or calculated they would earn, throughout the period of their license. These, they said, would be £2000 a year, which, calculating the value of an annuity of £2000 for twenty-eight or thirty years, would give a sum of £26,000 and upwards, while the value to the Government of an annuity of 1s. a year, the rate payable under the license, would be about 13s. 4d. Nothing could be fairer than the offer of the Government, nor more unreasonable than the answer to it given by the plaintiffs. In these circumstances it would take a strong case indeed to justify

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this Court in fixing upon the Government a liability for damage,—one not short of showing conclusively, not only that the material which has occasioned the present condition of the slip had come from the breakwater works, but that the material had been thrown into the sea with the purpose of its so coming to the slip, and with the malicious intention of doing the damage complained of, or with a reckless disregard of consequences almost amounting to malice; but there is not the slightest pretext for such a case. With regard to the question reserved from the outset—as to whether the Government was the proper party to be sued as defendant—I have not mentioned it until now for reasons which will have become obvious, and I mention it now only for the purpose of saying that I do not intend to dispose of it even now. The language of the legislation upon this breakwater has been such as to make it very difficult to say what is the position of the Harbour Commissioners with relation to the Governor of the Colony, or to define their powers or liabilities. If it had been necessary to do so, of course I must have grappled with the difficulty; but being of opinion, for the reasons I have given, that the plaintiffs have not established a claim against any one, it is not necessary for me to say whether this or that person was or was not the proper party to be made defendant in the action. In short, if the inevitable result of constructing the breakwater must have been the washing out of loose matter from its works, and the accumulation of that matter in the neighbourhood generally, and upon the slip-works in particular, a result which no skill or care could prevent, then as the construction was no greater use of the right to raise works in the bed of the sea than every subject is entitled to exercise, unless prevented by legal authority, and by virtue of which these very plaintiffs had themselves erected their own works, the plaintiffs, who chose the site of their works with a perfect knowledge that the breakwater was about to be erected, and adhered to the choice even after they had been offered a change of site, have themselves only to blame if they have suffered any damage from these breakwater works, and cannot have any claim for its reparation. They came to the evil; the evil did not come to them. Still less can



they have any such claim when the construction of the breakwater had not been by a subject claiming a right to use the bed of the sea in common with these plaintiffs and his other fellow subjects, but by the Government, acting under the super-eminent authority of the Parliament of the Colony. If, on the other hand, the washing out of loose matter from the works of the breakwater was not an inevitable result, but one which in the opinion of skilled persons might have been avoided, that opinion being formed after the action of the sea upon the works through the force of the winds and currents had been ascertained, I am of opinion that it has not been proved that those employed in the construction of these works were bound to have known this *ab ante*. On the contrary, it seems to me to have been proved that the probability or possibility of matter being carried by the sea was deliberately investigated and considered both by Andrews and Coode before the works were begun, and that directions were given by them to prevent the washing out of the works except in one portion of them, *i.e.* to the north of the breakwater itself, whence it was not anticipated that injury could arise to the breakwater works themselves, and still less to the slip works of the plaintiffs, which were very remote; and that in the operations at the breakwater generally a reasonable amount of skill and ability was displayed, and that that is sufficient to justify what was done and to relieve from responsibility for any damage which may have arisen from what was done, supposing it to have been proved to have so arisen. But I am of opinion, further, that it has not been proved that the accumulation of sand did come from the breakwater works. It is possible, I might say probable, that it would have occurred though the breakwater works had never been begun. There was a tendency to the accumulation of sand at the site of the slip before that work was begun; and even if that should not be sufficient to account for the two shoals upon the slip, the evidence of the plaintiffs as to the operation of the sea currents will not account for the particular form, nor for the respective position, of these two shoals. Upon every ground, therefore, I am of opinion that the judgment of the Court ought to be for the defendant. While feeling myself constrained

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to take this view, it is some satisfaction for me to be able to entertain a hope that the damage claimed by the plaintiffs is more imaginary than real, and that they will in time be able to use their slip as they were able to use it for every ship they attempted to take up except the *Tetuan*,—the accident which I must think was attributable not to any defect in the slip, but to the mode in which she was put upon the cradle. The vessel belonged to the plaintiffs themselves, and was being taken up for the purpose not of repairing her but of breaking her up for firewood. Such being the use to which the vessel was about to be applied, less care may have been shown in the mode of taking her up than otherwise would have been. But even supposing the shoals to have been the cause of the accident to that ship, the upper one has since disappeared, and the lower one has so changed its form as to give a reasonable hope that it also will disappear in time. The shingle formation at the root of the slip, it was proved, could be removed at a trifling expense, and re-accumulation at that point could always be prevented, as it was until lately.

WATERMEYER and CLOETE, JJ., concurred.

# CASES

DECIDED

## IN THE SUPREME COURT.

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### PART II.

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EXECUTORS OF LELTERSTEDT *vs.* PILKINGTON.

*Provisional judgment.—Assignment.—Assent.*

*Provisional judgment was allowed when the executors had not given the impression that they assented to a deed of assignment in favour of creditors.*

Motion for provisional judgment on a promissory note for £179 9s. 4d. It was stated on affidavit that previous to the day on which the note in question fell due, the defendant had executed a deed of assignment, in favour of his creditors, which was presented to the plaintiffs, who having considered the same, declined to execute it, but gave the defendant to understand that they would not interfere with any arrangement. With this understanding the assignment was carried through without the signature of the plaintiffs, and the defendant's assignees proceeded to realize his assets. For the plaintiffs it was said that the Secretary to the Board of Directors, when asked to execute the assignment, said it could not be done without the consent of the directors, and that subsequently the directors resolved, that as there was a

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minor who was interested in the property, they would not sign the deed.

THE COURT held that the plaintiffs were entitled to provisional judgment, but not against any portion of the assets which had been assigned. They distinguished this case from that of *Juta & Co. vs. Glyn (a)*, because here the plaintiffs had never actually assented or given the impression that they assented to the deed of assignment.

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RAWSTONE vs. THERON.

*Defendant.—Insufficient designation.*

*It is not sufficient in a promissory note to designate a person by his initials, for the Christian name must be given in full. Provisional judgment refused in consequence.*

1864.  
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—  
Rawstone vs.  
Theron.

Motion for provisional judgment on a promissory note against a defendant designated as J—— C—— Theron.

*Watermeyer*, for the plaintiff.

*The Attorney-General*, for the defendant.

*The Attorney-General* took the objection that the defendant was incompletely designated, and therefore that judgment could not properly be given against him.

He relied on *Rees vs. Heydendryck (b)* and *Norden vs. Hoole (c)*.

*Watermeyer*, for the plaintiff, distinguished the above cases, as here the defendant had appeared, and had therefore waived the objection.

THE COURT refused to grant provisional judgment. It was quite true that the defendant had appeared, whereas the

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(a) *Ante*, p. 102.

(b) 1 *Menzies*, 124.

(c) 1 *Menzies*, 125.

cases cited had been undefended ones; but they were of opinion that this was not a valid distinction, and that even if the defendant appeared he might take the objection, which the Court would uphold.

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Hawstone vs.  
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ANDERSON, SAXON AND CO. *vs.* LAURENBERG.

*Ship.—Freight.—Lien.*

*A charter-party stipulated that as to two-thirds of the freight it should be paid by bill at three months from date of delivery at the freighter's office in London of the certificate of the right delivery of the cargo. Information that the freighter had suspended payment reached the master of the ship to which the charter-party related at the Cape, and he thereupon refused to deliver the cargo, retaining it as security for the balance of freight.*

*In an action against the master of the ship by the consignees of the cargo for non-delivery :*

*Held,—that they were entitled to recover.*

Action by consignees of a cargo against the shipowner for non-delivery of the cargo. The facts and the charter-party are set out in the judgment of the Court.

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*The Attorney-General and Watermeyer, for the plaintiffs, the consignees of the cargo, argued that plaintiffs were entitled to the cargo by the terms of the contract. The parties had waived the ordinary shipowner's lien by the terms of the contract. They relied on How vs. Kirchner (a) and Kirchner vs. Venus (b).*

*Cole, for the defendant, argued that delivery of the goods could not be enforced when it was clear that De Mattos, the consignor of the goods, was unable to perform his part of the contract.*

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(a) 11 Moore, P. C. 21.

(b) 12 Moore, P. C. 361.

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He referred to *Mathew vs. Smith* (a), *Stevenson vs. Blackcock* (b).

*The Attorney-General*, in reply.

*Cur. adv. vult.*

THE CHIEF JUSTICE:—This action is brought by the consignees of a cargo of coal against the owner of the ship *Dan* for the non-delivery of her cargo at Table Bay, the port of her destination. The defendant claims a right to detain the goods as a security for a portion of the freight earned by the vessel, which, it is admitted, has not yet been paid. The question whether that right exists, depends upon the contract which was made between the parties. The bill of lading, bearing the endorsement of the shipper of the goods, and dated 9th November, 1863, contains the following clause with respect to freight: "Freight and all other conditions for the said goods to be paid by the freighter, as per charter-party." We must, therefore, look to the terms of the charter-party to see what provisions are made with respect to the payment of the freight: "Charter-party.—It is this day mutually agreed between T. Kruse, Esq., owner of the good ship or vessel called the *Dan*, of 490 tons, or thereabouts, now in the port of Nantes, whereof Laurenberg is master, and W. N. de Mattos, Esq., of London, merchant, that the said ship, being tight, and staunch and strong, and every way fitted for the voyage, shall, with all possible despatch proceed direct to Cardiff, and there load in the usual and customary manner, in regular turn, not exceeding ten days, ready and in berth, at any one of the collieries freighter may name, a full and complete cargo of coals, which the said freighter binds himself to ship, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture, and freighter to name stevedore; and being so loaded, shall therewith proceed to the Cape of Good Hope, Table Bay, for orders (which are to be given within twenty-four hours) to discharge there or at Simon's Town, or so near thereunto as she may safely get, and deliver the same alongside any

(a) 2 House of Lords Reps. 209.

(b) 1 Maule & Selwyn, 535.

craft, steamer, floating dépôt, or pier, where she can lie afloat, as ordered by the consignee; notice to be given to the agents of the vessel being ready to discharge. (The act of God, the Queen's enemies, fire, strike of pitmen, and all and every other danger, accidents of the seas, rivers, and navigation during the said voyage always mutually excepted.) The freight to be paid in London, on unloading, and right delivery of the cargo, at, and after the rate of 26/—say 26/—for Table Bay, or 27/6—say 27/6—for Simon's Bay, per ton of 20 cwt. on the quantity delivered in full of all port charges, pilotages, Butte dock wharfage, harbour dues on cargo, and Dover and Ramsgate dues, as customary; and such freight is to be paid—say one-third by freighter's acceptance at three months from the final sailing of the vessel from her last port in the United Kingdom, the same to be returned if the cargo be not delivered at the port of destination from any cause not conceded by usual London Insurance Policy; the freighter to insure the amount, and deduct the cost of so doing from the first payment of the freight, and the remainder at like bill at three months from date of delivery at freighter's office in London of the certificate of the right delivery of the cargo, agreeably to bills of lading, less cost of coals or fuel, short delivered, or in cash, under discount at 5 per cent. per annum, at freighter's option. The cargo to be discharged at the average rate of not less than 25 tons a working day, weather permitting, or to pay demurrage at the rate of fourpence per ton register O. M. per diem. The vessel to be addressed to the freighter's agent abroad, free of commission, paying 2 per cent. to freighter in London; and if she returns to London to Johs Grönsund, to whom the commission of 5 per cent. on this contract is due, ship lost or not lost. Any duty which may be levied in consequence of the vessel not being British to be borne by the owner. All claims for average to be settled in London in conformity with the rule at Lloyd's, £150 to be advanced in cash at port of discharge on account of this freight upon customary terms, against captain's draft on freighter, at ninety days' sight. The ship and her freight are bound to this venture. The penalty for non-performance of this agreement is to be the estimated amount of freight.

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March 8.

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The captain is to address himself to Messrs. W. Anderson, Saxon & Co." It is to be observed that by this document two-thirds of the freight are payable, not, as is more usual, on the delivery of the goods, but by a bill at three months from date of delivery at freighter's office in London of the certificate of the right delivery of the cargo agreeably to bills of lading. It appears by the admission made between the parties, that on 7th December, 1863, De Mattos, the freighter of the coals, suspended payment, and became in insolvent circumstances; and the knowledge of this fact having reached the captain of the vessel at this port, before he had delivered the coals, he immediately set up his claim of having a lien for the freight remaining due, and refused to deliver without payment or security of payment. Whether he is justified under the circumstances in setting up this claim is the point we have to determine, and it appears to me that no such right of lien exists. It has long been settled by the authorities that the right of lien for freight which exists at common law may be waived by the shipowner if he enters into a contract which is unconnected with the retention of that right. On this principle in *Alsager vs. St. Catherine's Dock Company* (a), and in *Foster vs. Tolby* (b), a similar decision was arrived at, although in that case the charter-party contained a clause that the shipowner should retain a lien for all freight, dead freight and demurrage. Many authorities were cited at the Bar, but I do not consider it necessary to discuss them where cases of a modern date have so clearly decided the question before us. Our judgment will, therefore, be for the plaintiffs, with costs.

BELL, J.:—In this case I was at first in doubt whether our judgment should not be for the defendant, because of distinctions which might plainly be taken between this case and the two in the Privy Council on which the argument for the plaintiffs, the owners of the goods, was rested; but upon fuller consideration, and a reference to cases which were not referred to by the Bar in the course of the argument, I am of opinion that our judgment must

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(a) 15 Law J., Ex., 34.

(b) 28 Law J., Ex., 81.

be for the plaintiffs, for delivery of the coals without payment of the freight. By the charter-party, the cargo being deliverable in South Africa, it is stipulated that the "freight is to be paid in London, on unloading and right delivery of the cargo, say one-third by freighter's acceptance at three months from the final sailing of the vessel, the same to be returned if the cargo be not delivered, and the remainder by like bill at three months from the date of delivery at freighter's office in London of the certificate of the right delivery of the cargo." What was thus stipulated to be paid by the charter-party was, strictly speaking, freight. It was "the reward," in the language of Lord Kingsdown in *Kirchner vs. Venus (a)*, "payable to the carrier for the safe carriage and delivery of the coal," "it is payable only on the safe carriage and delivery," and "if" the coal had been "lost on the voyage," "nothing is payable." In this respect the case differs both from *How vs. Kirchner (b)* and from *Kirchner vs. Venus (a)*, in both of which cases the stipulation was for payment *before* the cargo could have been delivered, and irrespective of its delivery. A current of authorities had decided that in such a case the right of lien on the cargo for payment of the freight before delivery of the cargo was gone. *Gilkinson vs. Middleton (c)*, which was decided in 1857, had been supposed to have unhinged the law so far by sustaining a claim for lien where, in fact, the freight was payable *before* the goods could have been delivered; and *Neish vs. Graham (d)*, which was decided also in 1857, was to the same effect, upon the authority of *Gilkinson vs. Middleton (c)*. It seems probable, however, that at the time *Neish vs. Graham (d)* was argued, the case of *Gilkinson vs. Middleton (c)* had not yet been reported, and that its nature was taken upon the statement of counsel only. I say so because no book of reports was mentioned when the case was referred to, and if the report in the Law Journal be now referred to, it will be seen that the stipulation that payment for freight should be made at a time prior to the delivery of the cargo, though mentioned in the statement of

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(a) 5 Jurist, N.S., 395; 12 Moore, P. C. 361.

(b) 11 Moore, P. C. 21.

(c) 2 Common Bench (N.S.), 134.

(d) 8 Ellis & Blackburn, 505.

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the facts of the case, was not relied on by either side of the Bar for any purpose whatever, and was not even noticed from the Bench. The only question raised and decided was, whether the lien, which was taken for granted as existing, should cover only the freight mentioned in the bills of lading, or should be extended to embrace a sum of £900 payable under the charter-party. *Gilkinson vs. Middleton* (a), therefore, never decided that a lien should subsist notwithstanding a stipulation for a payment in name of freight at a time anterior to the delivery of cargo; and as *Neish vs. Graham* (b), though it did affirm that proposition, did so only upon the erroneous statement of counsel that *Gilkinson vs. Middleton* (a) had done so likewise, neither of these cases can be said to have disturbed the current of previous authorities, laying down that a shipowner by taking a stipulation for payment at a time anterior to delivery of a cargo, of a sum of money in name of freight, stipulates for something which is not strictly of the nature of freight, and cannot have the right of lien which the law otherwise would have given him for freight, properly so called. But whatever may be the true reading, or history of these two cases, those of *How vs. Kirchner* (c) and *Kirchner vs. Venus* (d) restored the law to what it seems previously to have been. In *Gilkinson vs. Middleton* (a), *Neish vs. Graham* (b), *How vs. Kirchner* (c), and *Kirchner vs. Venus* (d), the stipulation was for payment *before* the delivery of the cargo. In the present case the stipulation is for payment *after* delivery, and only after delivery. If delivery had never taken place, payment would never have been due. The stipulation in the present case, therefore, was for freight properly so called, and it did seem to me at first that the stipulation being such, the right of lien would subsist, notwithstanding the cases which had been cited to us; but, on reference to the case of *Alsager vs. St. Catherine's Dock Company* (e), which is referred to in the report of *How vs. Kirchner* (c), it appears that the stipulation there was, as in this case, for payment at a time subsequent to the delivery of the cargo, and in that case the Court of Exchequer decided that the shipowner had abandoned his lien by taking a

(a) 2 C. B. N.S. 134. (b) 8 E. & B. 505. (c) 11 Moo. P. C. 21.  
(d) 12 Moo. P. C. 361. (e) 15 L. J. Ex. 34.

stipulation for the payment of the freight, *irrespective* of the delivery of the goods. This judgment seems to me, on reflection, to be founded in reason and justice. The stipulation of the charter-party being for payment of freight, in my opinion properly so called, if the charter-party had not contained any mention of the mode or time of payment, a lien would by law have been attached upon the coals for payment of the freight, and by virtue of that lien a *jus retentionis* would have accrued to the shipowner. But the charter-party after stipulating that one-third of the freight is to be paid at a time before the delivery of the coals was possible, with a proviso that the money should be repaid if the coals were not duly delivered, preserving thereby the character of freight—as to which no question arises—stipulates, as to the remaining two-thirds, not that they are to be paid contemporaneously with the delivery of the coals, but at a time subsequent to delivery. According to the express terms of the charter-party, the coals are to be delivered without payment of the freight; being delivered, the consignee is to give a certificate of the delivery, and upon production of that certificate in London to the charterer, the charterer is then, and not till then, to make payment of the freight by bills at certain dates. By this contract the shipowner has contracted himself out of the *jus retentionis* which the law would have implied, and given effect to, if the charter-party had been silent upon the subject; because it is plain that he cannot use the *jus retentionis* and at the same time perform his part of the charter-party by giving delivery of the coals, and taking for his payment bills to be thereafter delivered to him in London, and payable three months thereafter. If this question were with De Mattos, the charterer himself, it might be different; but even as to him it is doubtful, after the case of *Alsager vs. St. Catherine's Dock Company* (a), whether the parties denying the right of lien were the assignees in bankruptcy of the charterer, whether the shipowner might not be bound to deliver the coals, and to look for his payment in the manner stipulated by the charter-party. But the question here arises between

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(a) 15 L. J. Ex. 34.

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parties who are strangers to De Mattos, and indorsees of the bill of lading, and through it of the charter-party; and we cannot assume that to depart from the contract with De Mattos by reviving the lien, will not prejudice the rights of these third parties, who have contracted with De Mattos on the footing of the shipowner's contract with De Mattos. It is to that case of *Alsager* and the others referred to along with it, but to which I have not been able to obtain access, that no doubt Lord Wensleydale refers, when, in giving the judgment of the Privy Council in *How vs. Kirchner* (a), he says:—"A shipowner is entitled to a lien upon the cargo for his freight, unless he has entered into a contract at variance with that lien, as, for example, in some of the cases which had been cited in the argument, where the contract is to pay *after* the delivery of the cargo, and not at the time of the delivery." The law, therefore, seems to be established that a stipulation for payment in name of freight after delivery of the goods, equally with a stipulation for such payment *before* delivery, is inconsistent with a right of lien, and will destroy it. It was argued for the defendant, the shipowner, that lien being an incident to the contract of affreightment, and the stoppage of payment or the insolvency of the charterer, and his probable bankruptcy by this time, rendering it impossible for him to perform his part of the contract by giving his bills for the two-thirds of the freight when the certificate of delivery shall be presented to him; therefore, the right of lien revives, and the shipowner is entitled to demand payment of the freight before being called upon to deliver the coals. The only authority which was referred to for this position that the right of lien revives, was the case of *Stevenson vs. Blakelock* (b), in which the Court of Queen's Bench sustained the lien of an attorney for his bill of costs after he had taken promissory notes from his client for payment of his costs, because these promissory notes had been dishonoured, which the Court said, "placed the attorney in his original position as to lien." Lord Eldon, in *Cowell vs. Simpson* (c), where the question arose upon an attorney's lien, the attorney having taken two notes payable

(a) 11 Moo. P. C. 21. (b) 1 Maul & Sel. 535. (c) 16 Vesey, 279.

three years after date, had said, "Where these special agreements are taken the lien does not remain, and whether the securities are due or not makes no difference." But the Court of Queen's Bench, in *Stevenson vs. Blakelock* (a), considered that the fact of the notes being not only due but dishonoured, differed that case from *Cowell vs. Simpson* (b), and sustained the lien as revived by that circumstance. I find, however, that in *Alsager vs. St. Catherine's Dock Company* (c), the plaintiffs setting up a right to have delivery of the goods without payment of freight, were, as I before observed, the assignees in bankruptcy of the charterers, and therefore payment of the freight according to the terms of the charter-party could not be performed; and yet the Court of Exchequer sustained the right of delivery claimed, notwithstanding *Stevenson vs. Blakelock* (a) was relied upon by the shipowner in the course of the argument, Chief Baron Pollock using the expressions, "If the shipowner could not have refused to deliver the goods, provided the charterer had continued solvent, he cannot maintain that claim now." We have, therefore, the authority of Lord Eldon and of the Court of Exchequer for saying that the right of lien does not revive by the inability of the charterer to make payment according to the charter-party in a mode inconsistent with the right of lien. For these reasons, I am of opinion that the judgment of the Court ought to be for the plaintiffs.

CLOETE and WATERMEYER, JJ., concurred.

[Attorneys for the Plaintiffs, FAIRBRIDGE & ARDERSE.]  
[Attorney for the Defendant, HULL.]

#### BELL vs. JAMES.

*Resident Magistrate.—Arrest.—Supreme Court.*

*A Resident Magistrate cannot issue an arrest in the Supreme Court.*

Motion by the defendant to set aside an arrest issued by the Resident Magistrate of Queen's Town.

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Feb. 25.  
March 8.  
Anderson,  
Saxon & Co. vs.  
Laurenberg.

1864.  
March 10.  
Bell vs. James.

(a) 1 Maul & Sel. 535. (b) 16 Vesey, 279. (c) 15 L. J. Ex. 34.

1864.  
March 10.  
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*The Attorney-General*, for the motion, argued that a Resident Magistrate, though he had power to issue an arrest in the Circuit Courts, had not such power in the Supreme Courts.

THE COURT set aside the writ.

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WOOD vs. THE EASTERN PROVINCE BANK.

*Banking Company.—Amalgamation.*

*The shareholders in a banking company having agreed to amalgamate with another bank, a dissentient shareholder moved for an interdict to prevent the amalgamation: Held, —that as the deed of settlement gave no power to the bank to amalgamate, the applicant was entitled to an interdict.*

*Semle, the company should have been dissolved before attempting to amalgamate.*

1864.  
March 24.  
Wood vs. The  
Eastern  
Province Bank.

Motion for an interdict to prevent the amalgamation of the Eastern Province Bank with the Commercial and Agricultural Bank. The applicant, Mr. George Wood, was a shareholder in the former bank, and he dissented from a proposed amalgamation between the two banks; he was the only shareholder who raised an objection to the measure.

The Eastern Province Bank was established in 1845; it had previously existed under a deed of agreement, but in that year the existing deed of settlement was executed. By the 80th section of the deed it was provided, that at a special general meeting convened on the requisition of twenty-five proprietors, and after a notice of six weeks, it was competent for the meeting to repeal, alter, or modify any section of the deed, provided that nine-tenths of the proprietors present concurred in the same. On November 23rd a notice was issued by the directors professedly in the terms of the 80th section. The notice set forth that a meeting of the proprietors would be held for the purpose of

considering the proposal to increase the capital of the bank by the issue of new shares, and to make provision for the extension of the business ; to consider the propriety of amalgamating with another bank ; and to consider certain proposals on the latter subject from the Frontier Commercial and Agricultural Bank. The meeting was held on January 8th. The meeting was adjourned, but generally the proposal for amalgamation was agreed to.

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*Watermeyer*, for the motion, argued that the extension proposed by the amalgamation was outside the original constitution of the bank, and that proprietors could not make so fundamental an alteration as was proposed. It was doing more than dissolving the business, which was within the power of the shareholders. He referred to *Ernest vs. Nicholls* (a), *Re The Phoenix Life Assurance Company* (b), *Re Joint Stock Winding-up Act 1848*, *Re Saxon Life Assurance Society* (c).

*The Attorney-General*, for the Eastern Province Bank. He argued that as soon as the amalgamation took place the old bank would be dissolved, and that this was within the power of the shareholders ; in other words, the power to dissolve gave the power to amalgamate and dissolve. He referred to *Maynard vs. Smuts* (d).

*Watermeyer*, in reply.

THE CHIEF JUSTICE said that the Court was of opinion that the interdict prayed for should be granted. If the parties had acted as was done in the case of the Colonial Bank, out of which the case of *Maynard vs. Smuts* (d) had arisen, the present difficulty might have been avoided. For when the company was dissolved, the applicant or any other shareholder might have retired from the bank with his capital. It was said that the course taken in the present case was practically the same, but the Court could not agree with this view. For it appeared to the Court that when the parties agreed to amalgamate they determined to alter the constitution of the Eastern Province Bank so as to lay a foundation for constituting a new bank. The meeting had

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(a) 6 House of Lords Cases, 401.

(c) 32 L. J. Ch. 206.

(b) 31 L. J. Ch. 749.

(d) 3 Menzies, 570.



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Province Bank.

dealt, in fact, with matters in a way quite inconsistent with the deed settling the constitution of the Eastern Province Bank, and therefore the action of the directors and shareholders was *ultra vires*. To amalgamate with another bank was not within the power of the shareholders as the bank was constituted. The Court, however, were of opinion that this was not a case where the applicant should have his costs, for though strictly in his right, it was not clear that he was making a proper or judicious use of his power.

*In re* THE MUNICIPALITY OF CAPE TOWN.

*Act No. 1, 1861, §§ 33, 38, 40, 41.—Interdict.—Superintendent of Works.—Restraining payment of salary.*

*The Commissioners of the Municipality of Cape Town appointed a Superintendent of Public Works without previously obtaining the consent of the Wardmasters, under the 4th Regulation, as pointed out by § 38 of the Act No. 1, 1861. The joint meeting of Commissioners and Wardmasters held under § 40 of the Act, No. 1, 1861, by a majority disallowed the salary of this officer, and upon an application by five Wardmasters, the Court granted an interdict restraining the Commissioners from paying the salary.*

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April 9.  
—  
*In re* The  
Municipality of  
Cape Town.

Motion for an interdict to restrain the Commissioners of the Municipality of Cape Town from paying a sum of £250 as salary to one De Villiers, as Superintendent of Public Works. The salary in question had been disallowed by a majority at the joint meeting of Commissioners and Wardmasters held under sections 40 and 41 of Act No. 1, 1861. It appeared that after the meeting in question had disallowed the above salary, the Commissioners had resolved to pay the same; five Wardmasters, therefore, made this application to the Court.

*Watermeyer*, for the motion, argued that as soon as the joint Board had disallowed a particular item, the Commissioners had no jurisdiction to continue the office. He also argued that Mr. De Villiers had not been *de jure* permanently appointed to the office of Superintendent of Works.

*The Attorney-General*, for the Commissioners, argued that the Wardmasters must be taken to have assented to the creation of the particular office, and that section 40 gave them no power to make or put an end to a particular office; by section 33 this power rested with the Commissioners.

*Watermeyer*, in reply.

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April 9.  
In re The  
Municipality of  
Cape Town.

BELL, J.:—This is a motion for an interdict to restrain the Commissioners of the Municipality from paying the sum of £250 as salary to the Superintendent of Public Works. It appears that there had been an office of Superintendent of Streets, which was abolished in 1861, and a new one created, which embraced the duties of the old office and something beyond it. At a meeting held in 1862 of the joint Board of Commissioners and Wardmasters this new office was created, and a certain salary was given, and in consequence of these resolutions the Commissioners appointed Mr. De Villiers for a year at a salary of £250. In the month of January, 1863, Mr. De Villiers wrote to the Commissioners, speaking of what he had done, and applying to be permanently appointed. On the 13th he received a letter, stating that his appointment had been made permanent. The Commissioners did this, although they knew that in that very month, or at furthest the following one, there would be a meeting of the joint Board; but without waiting for that meeting, the Commissioners took it upon themselves to make the appointment permanent. How far in doing so the Commissioners had made themselves personally liable to Mr. De Villiers is not the question before us. In February the Commissioners and Wardmasters met as one body, and by a majority resolved that the new office was unnecessary and ought to be abolished. Now this was a notice to the Commissioners, whether it was within the scope of that meeting to abolish the office was another thing; but it certainly gave the Commissioners notice that in the opinion

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of the Wardmasters the office was unnecessary and ought to be abolished. The Commissioners had agreed with Mr. De Villiers that his office should be a permanent one, and took no notice of the opinion of the Wardmasters, and the applicants now come into Court to declare their legal opposition to the payment of the salary. A general meeting was also held in February, 1864, when that body exercised the powers given to it by the 40th section of the Act by altering the estimates and coming to the resolution that the items of Superintendent of Public Works, and the keep of a horse for him, should be expunged. This resolution was passed by a majority of thirteen votes at the meeting in February last. I don't say, and it is not necessary for me to say so, that the Wardmasters have no power to control the expenditure in this way, as the present application rests entirely on a different point. The Commissioners derived their power to appoint in virtue of the 33rd section of the Act, which is this: "It shall be lawful for the said Commissioners for the time being, acting in pursuance of any municipal regulations to that effect, and they are hereby authorized and required to appoint during pleasure a secretary, a treasurer, an engineer, and such other officers as shall be specified in any such regulations, and to remove and displace the same." These officers were appointed during pleasure, the pleasure of the Commissioners, and thus we come back to the same thing. If the Wardmasters have the power to interfere with the appointment of an officer, during the pleasure of the Commissioners, the words "during pleasure" were of no avail. The usual words used in appointments were during pleasure, or for life; but have the Wardmasters the power to express any pleasure on the subject, under the 33rd section? Now, reading the 33rd section as a law to the Commissioners, to the Wardmasters, and to all the world, it seems that the Commissioners should have a secretary, a treasurer, and an engineer. It is not in the power of the separate or joint Boards to abolish these offices; but the section does not stop here, for it goes on to say, "or such other officers as may be set forth in the Regulations." The regulation here referred to is the 4th, which is: "It shall be competent for the Commissioners to appoint a secretary, treasurer, engineer,

clerk, messenger, and such other officers as they may deem necessary, to carry into effect the various duties connected with the Municipality; the salaries of those officers to be approved of by the Wardmasters. No new office shall be created without the consent of the Wardmasters." This regulation is clear, and was introduced as a portion of the law, and under it, the Commissioners have the power to appoint not only a secretary, treasurer, and engineer, but a clerk and a messenger also, and such other officers as they may consider necessary. The salaries of these officers are to be approved of by the Wardmasters alone, and no new office can be created without the consent of the Wardmasters alone. Then, the Commissioners may appoint their officers as they think necessary, but they must get the consent of the Wardmasters to the creation of the office and to the salary. In the present case, one of their rules was not observed, for the intention to create the office, and to fix the salary, was never submitted to the Wardmasters as such, but was disposed of by the joint meeting, the twelve Commissioners being empowered to take part in the proceedings at such meeting. The proper course for the Commissioners to have adopted was to have called a meeting of the Wardmasters under the 21st regulation, which provided the machinery for calling such a meeting, and to have submitted the creation of the office to the Wardmasters in that way. Having got the consent of the Wardmasters to the creation of the office, the next duty of the Commissioners would have been to submit the salary, and as no such office has been legally created, they must now retrace their steps, submit the question to the Wardmasters whether they are of opinion that such office should be created. I think it is the duty of the Court to restrain the respondents from making any further appointments without having obtained the consent of the Wardmasters. As for the inconvenience of the process, that is not for the Court to consider. It may be inconvenient to have two bodies sitting, and it is a matter of great consequence to both bodies; but it is not for the Court to alter the law and give it another interpretation, because of the inconvenience suggested by the reading of it. It has been said that if an office has once been created by the Wardmasters, and the salary

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Cape Town.

agreed to, that it cannot be altered; but I cannot conceive that it is so. The Act does not say that an office once created cannot be abolished; but it does provide a means by which the Wardmasters can take away the power of making it permanent.

CLOETE, J.:—This is a very important case, and I think it right that I should state my opinion that when officers are appointed under the 33rd section of the Act, which expressly authorizes the Commissioners to make such appointments, the officers then named are permanent, as they are declared by the Legislature to be necessary to carry on the works of the Municipality, that they are as necessary as the Commissioners and Wardmasters themselves. When the salaries of these officers have been fixed at a meeting and have been duly passed, the offices become permanent offices, and are not liable to be abolished at a joint meeting. In the 4th regulation we find that two other offices are named in addition to those in the Act, namely, a clerk and a messenger, and these must be considered equally as fixed appointments, and as such are to be considered on the fixed establishment. The concluding words of the section are that no new office shall be created without the consent of the Wardmasters. The appointment now in dispute is not that of the engineer, it is not one of the five appointments named in the Act and the regulation, but it is a new appointment, an original appointment made in 1862, and in making it, the Commissioners overlooked the provisions of the Act, and in that respect fell into an error. Where a question affecting an office is challenged, it is necessary to see what the Legislature provided with reference to it, and then it is found that the terms of the 4th regulation have not been complied with. The Attorney-General has pointed out that the Municipality consists of three distinct Boards. There is the body of Commissioners, the body of Wardmasters, and the joint body, and the creation of a new office ought to have been laid before a special meeting of Wardmasters, which the Commissioners have a right to call under the 21st and 22nd clauses of the Act. To this meeting the proposal of the Commissioners should have been

submitted, and it would then have been the duty of the Wardmasters to say whether they concurred with the Commissioners in deeming it necessary to have certain permanent officers over and above the five named. It was the duty of the Commissioners to have called a special meeting to ascertain their views and make out a case. This is an item for the Commissioners to submit, and the Wardmasters to consider, simply from year to year, for until the proper steps have been taken, it could not become a fixed and permanent appointment. I feel bound to look at this case, in which an appointment has been called in question, as one of an officer who does not hold such an appointment as may be considered permanent, and I am of opinion that the respondents should be interdicted from paying the salary of an officer which has been refused by the Wardmasters.

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The interdict was accordingly granted restraining the respondents from paying the salary of the Superintendent of Public Works.

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In re EBDEN.

*Curators bonis.—Agent.—Incapacity.*

*An agent with a power of attorney from his principal in England became incapable of conducting business; the Court appointed three persons as curators bonis of the agent, with limited powers.*

G. W. Ebden was appointed by R. A. Granger, of Cape Town, who traded as Granger & Co., to be his general and special agent and attorney, to manage and conduct his business on his leaving the Colony. Ebden became afflicted with a mental disorder, and incapable of managing the affairs of Granger & Co., which had a large trade in Guano, and employed many hands and ships. In consequence of the incapacity of Ebden the business was rapidly becoming disorganized, and at a meeting of creditors and others interested in the estate, it was determined to apply to

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In re Ebden.

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the Court to appoint three persons who were selected by the meeting as *curators bonis* to Ebdem, in order to carry on the business of Granger & Co.

*Watermeyer*, for the motion, showed by affidavits that it was necessary for the interest of Granger & Co. that some person should be nominated to manage the business until Mr. R. A. Granger, who was in England, could arrange what steps should be taken.

[THE CHIEF JUSTICE:—All the creditors must join in the application.]

*Watermeyer*:—They all in fact do so. It is absolutely necessary that the appointment should be made, or the concern will be obliged to cease business.

THE COURT, after stating that the application was an unusual one, said that they were inclined to give the three persons nominated power to carry on the business of Granger & Co., such as the fisheries, etc., and to collect debts, but not to give any further special powers. On the whole, they considered that the best course, both in the interests of Mr. Granger, who must be protected by the Court, and of the creditors, was to nominate the three persons who had been selected as curators, the order appointing them to state the actual powers entrusted to them, such order to be drawn up by the applicants, and to be settled by a Judge in Chambers.

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## POPPE vs. GLENDINING.

*Bill of Lading.—Shipping.—Damage.—Injury by Vermin.*

*Goods in a ship were injured by water, which reached them through a pipe having been gnawed by rats. The bill of lading exempted the shipowners from liability for injuries to the cargo by vermin: Held,—an injury by vermin within the meaning of the bill of lading.*

Action by the owners of certain goods against W. Glendining for damages for injuries to goods laden on board his vessel. The goods had been injured by water on the voyage, and on the vessel being examined it was found that the leakage had been caused by rats having gnawed a hole in a leaden pipe. There was a clause in the bill of lading by which the shipowners were to be exempt from liability in respect of damage caused by vermin. The facts were undisputed.

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—  
Poppe vs.  
Glendining.

*The Attorney-General and Watermeyer*, for the plaintiffs, argued that the plaintiffs were entitled to recover, as rats were not the *causa proxima* of the injury.

*Denyssen*, for the defendant, argued that the stipulation in the bill of lading was intended to cover such damage as this.

THE COURT gave judgment for the plaintiff. The stipulation in the bill of lading did not cover such damage as this, which was proximately caused by sea-water, not by the gnawing of rats. If the shipowner had wished to guard against such a mishap as this, he should have protected himself by larger expressions in the bill of lading.



## O'FLYNN vs. HENDRICKS.

*Magistrate's Officers.—Seizure.—Creditors.*

*Proceedings against a magistrate's officer who had seized property wrongfully, dismissed, as he had acted only as a creditor's agent.*

1864.  
June 2.  
—  
O'Flynn vs.  
Hendricks.

Motion calling on the respondent, the messenger of the Resident Magistrate's Court of Hermansdorf, to show cause why he should not deliver up thirty-five sheep belonging to the estate of A. M. Meeling, deceased, of whom the applicant was the executor. The sheep had been attached in a proceeding against O'Flynn personally not connected with his office as representative of the deceased.

*Watermeyer*, for the motion.

THE COURT refused the application. It should have been made against the creditor, and not against the subordinate officer, who was only acting according to his instructions.

## BARRY AND REITZ vs. JURGENS AND OTHERS.

*Uncertificated Insolvent.—Trading.—Ordinance No. 6, 1843, § 49.*

*Property obtained by an uncertificated insolvent was ordered to be delivered to the trustees, though it was claimed by persons who had advanced money for its purchase.*

1864.  
June 2.  
—  
Barry & Reitz  
vs. Jurgens  
and others.

Motion for a declaration that certain property belonged to the estate of one Jurgens, of which the applicants were trustees. The first respondent, Jurgens, was an uncertificated insolvent, the accounts and place of distribution of his estate not having been confirmed. After his surrender he borrowed money from one Schmidt, another of the respondents, and

proceeded to carry on business as a farmer. He became indebted to one Frierlich, and this debt not being paid, an execution was issued and the crops and stock on the insolvent's farm were seized. Schmidt and Reeve, another of the respondents, a servant on the farm, claimed the property as theirs, in respect of advances made by them, and in December an order was made by Watermeyer, J., restraining the sheriff from selling the property. The insolvent attempted to surrender his estate a second time, but the surrender was refused, and the plaintiffs, the trustees under the first surrender, claimed the property which the insolvent had become possessed of as part of the estate, under the Insolvent Ordinance, No. 6, 1843, section 49.

1864.  
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and others.

*Watermeyer*, for the motion.

*De Wett*, contra.

BELL, J., said that in this case the Court must accede to the application, and order the goods in question to be delivered to the plaintiffs. Jurgens being an uncertificated insolvent, was not in a position to be the owner of property, and the law did not allow him, directly after he had surrendered his estate, to begin to trade again. The parties who had given him the means to trade did so at their own risk.

CLOETE, J., concurred.

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DEANE AND JOHNSON vs. FIELD.

*Customs Duties.—Bond.—Act of Indemnity, Act No. 1, 1864.—Constitutional practice.*

*A Collector of Customs refused to deliver up goods to the owners on payment of the amount of duty then payable unless they entered into a bond to pay such increased duties as might be enacted by Parliament. This was done in*

*accordance with a resolution of the House of Assembly :  
Held,—that the Collector had acted illegally.*

*The case was adjourned, and subsequent to such adjournment, and before the case was again heard, an Act of Indemnity (Act No. 1, 1864) was passed by the Legislature in respect of this case : Held,—that the Court could not order the goods to be delivered to the applicants, and that the motion must be dismissed.*

1864.  
May 3, 6.  
—  
Deane &  
Johnson vs.  
Field.

Motion by Messrs. W. G. Anderson and J. Murison, trading as Dean & Johnson, calling upon the Honourable W. S. Field, Collector of Customs, to show cause why he had refused to deliver to the applicants certain tobacco and coffee belonging to them, and why the same should not be delivered up to them. It appeared that the goods in question were stored in bond, and that on April 30 the applicants tendered a sum of £620 as duty on the tobacco, and £178 for the coffee, being the proper amount then payable. But the applicants were also requested to enter into a bond to pay such increased rates or duties as might be proposed by the Government and enacted by Parliament during the present session. This request was made in pursuance of an order from the Governor in consequence of a resolution of the House of Assembly to the effect that such bond should be entered into by persons paying duties after April 29th. Upon a refusal to enter into such bond the applicants were refused their goods, and the Collector likewise refused to take the money tendered to him. The applicants further stated that they were put to loss and inconvenience by being unable to obtain their goods, and had protested against the above proceedings as illegal.

*Watermeyer*, for the motion, argued that the applicants were entitled to have their goods on tendering the sum then payable by law as duty. No mere resolution of the House of Assembly could be binding until it had been approved by the Legislative Council and the Governor and had become an Act.

*Dreyer*, for the respondent, objected to this important matter being decided in a summary manner.

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BELL, J., after stating the above facts proceeded:—In point of law the duties payable are those which could have been lawfully demanded at the time, and no lawful authority has yet altered them. There is no analogy between the constitutional practice of England and of this Colony in this respect, because by section 88 of the Colonial Constitutional Ordinance the Legislative Council may make such amendments as it thinks fit in money Bills, whereas the House of Lords has no such power. It is obvious that great trouble and loss may be occasioned to merchants who enter into such a bond as that mentioned, for no amount is specified therein, and the merchant is quite unable to say what price he should charge for his goods, so as to recoup himself for the future payment of duties, nor again is there any certainty when such proposed fiscal measure may become law. I have arrived at the opinion, therefore, that the Collector has acted illegally, and that he is liable in damages for what he has done. But the Court, in a case of this kind, prefers to express its opinion only, as that expression of opinion will doubtless be acted on by Government, and therefore no order will be made. If the Collector after this opinion still refuses to give up the goods, the application may be renewed.

CLOETE, J., concurred.

The application was renewed.

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The applicants had again demanded their goods, and had again been refused. On May 3rd the Legislature passed an Indemnity Act (No. 1, 1864), which was promulgated in a *Gazette Extraordinary* of May 4.

*Watermeyer* argued that such an act being *ex post facto* was unconstitutional, and therefore invalid. He referred to the constitutions of various countries in support of his argument.

*Dreyer*, for the respondent, was not called on.

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BELL, J.:—Previous to seeing the *Government Gazette Extraordinary* and the telegram, which I found lying upon my desk this morning, I committed my views upon this motion to writing, which I will now read: “On the former occasion I expressed my opinion that a resolution of the House of Assembly *alone*, though forwarded by the Governor, and therefore having apparently his approbation, could not justify the Collector of Customs in obeying that resolution, by refusing to merchants delivery of goods which had been bonded under an obligation to pay upon these goods the duties leviable by law at the time the delivery was demanded unless they would enter into a bond to pay whatever additional duty might be imposed by any Act to be thereafter passed during the present session of Parliament. While expressing my opinion that the resolution of the House of Assembly was not law, and therefore could not form any protection to the Collector of Customs if an action for damages should be brought against him by the merchants, I adverted to the inconvenience to trade and the possible injustice to merchants of requiring from them payments of duties additional to those duties which formed an item in their calculation of the prices at which they ought to authorize their agents to purchase in the foreign market, because it could not be absolutely predicated that the merchant would be able to recover the additional duty in the price at which he would have to sell to buyers from him, inasmuch as a plentiful crop or excess in importation of the particular article beyond the demand, might so disturb prices as to prevent the merchant, who had imported previous to advices of this increase, from reimbursing himself the additional duty demanded of him, and make him a loser even beyond the amount of that duty; and I venture to express my opinion as to the danger of tampering with so sensitive a subject as commerce, and as to how additional duties might be imposed, without working inconvenience or injustice, by deferring the imposition of the duties to a period which could not interfere with existing rights. I also upon the occasion of the first application adverted to the difference in the mode followed by the Imperial Parliament from that which had been adopted by the House of

Assembly, by showing that in England the Lords of the Treasury have never ventured to go further without law than to require payment or bond for payment of *specific* amounts of duty, upon *specific* articles which have been submitted to, discussed before, and approved of, first in committee, and then in the whole House of Commons, the only branch of the Legislature which can make any alteration in duties, the other branches having a mere veto; whereas here, where taxing Bills, though originating in the House of Assembly, may be altered or amended by the Legislative Council, or by the Governor, or be disallowed altogether by Her Majesty at any time within two years, the House of Assembly, without having had submitted to them from any quarter any list of particular articles on which an increase of duty was to be proposed, or any specification of the proposed increase on each article in the list, had in general terms authorized the requirement from merchants, importers, of a bond for payment of such additional duties as might be imposed in the course of the present session, to provide for the case of an additional duty being imposed upon the particular article imported by them; and I ventured to point out that this course of proceeding aggravated the inconvenience and possible injustice of raising duties upon goods already imported, by rendering it impossible for the merchants to continue their dealings, inasmuch as the seller had no means of fixing the additional price he should ask, in order to cover the possible additional duty. I adverted to these subjects as showing that reason and expediency confirmed me in the view I had formed of the illegality of the order sent to the Collector of the Customs, and as affording ground for thinking that on further consideration the resolution of the House of Assembly might possibly be abandoned by those by whom it had been promoted, and that the Collector of Customs might, after hearing the opinion of this Court, feel himself justified in disregarding the order which the Government had forwarded to him. But the Court was much misapprehended if it was supposed by anything that fell from it to be ready (as seems to be supposed by the motion for the order now asked from us) to put itself in direct conflict with the

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Legislature of the Colony. Since the first application was made to us matters have been entirely altered, so far as we have means of knowing what has passed in Parliament. According to the information that is given us the Legislative Council and the Governor have endorsed the resolution of the House of Assembly, and all the three branches of the Legislature have agreed in turning the resolution of the House of Assembly into an Act of Parliament. Not only so, but the Act goes further to declare that all judicial proceedings against parties who may have acted upon the resolution shall be null and void. What is this Court, then, that it should be asked to give an order which the Legislature has declared shall be a nullity? Are we to set ourselves above the law—we who are the mere exponents of the law? The thing is out of the question. On the former occasion the Court did not go further than to express its opinion, and deferred making any order until it should be seen whether the Government would not act upon that opinion. We took that course for two reasons—first, we thought it right from the respect we owe both to the Government and to the House of Assembly, not to anticipate that they would, like an ordinary litigant, persist in a course then at least illegal; and secondly, because we were not then in a position to know exactly what were the terms either of the resolution of the House of Assembly, or of the message of the Governor transmitting it to the Collector of Customs, and were ignorant of the grounds upon which the Government intended to support the order they had transmitted, there being no counsel to address us upon the subject; and I may add a third reason, because so long as the law continued as it then was the applicants did not suffer by delay in making of an order, because if they could not get immediate delivery of their goods, their claim for damages by reason of such delay would have continued unaffected, except in so far as it would have been increased by the continuance of the delay. But the law is now altered it would seem; what was law then is law no longer, and the power of this Court either to give the order originally asked, or that more forcible one now asked, or to give relief in

damages, if such relief previously was due, has been taken away. The Court did not foresee that the three branches of the Legislature would so speedily turn this resolution of the House of Assembly into law, and fortify it by an indemnity to the Government officers, as seems to have been done, for we are not in a position to do more than to surmise what has been done in the East. We cannot now give either the order that was asked upon the former occasion, or the more stringent one now asked; but I do not know that the applicants have suffered by the delay of the Court to do more than express its opinion; because if it had been intimated to us beforehand that the three branches of the Legislature meant to do what we are informed, and have reason to believe they have since done, I do not think this Court would have given such a shock to society as to exhibit itself running a race with such bodies as the legislative branches of the Colony, to anticipate and prevent their action by legislative enactment. Such a course would not only have been indecorous, but it would have been futile and impotent. This Court has ample powers to enforce the law, as it exists according to its judgment, but it is utterly powerless to prevent an alteration of the law, to the effect even of nullifying its proceedings under the law as it previously existed. We have not even yet had a copy, far less an authenticated copy, either of the resolution of the House of Assembly, or of the Governor's message transmitting that resolution, or of the Act of the Legislature turning, as is said, the resolution into law. When these are laid before us they may possibly change the aspect of matters. I desire, therefore, to be understood as not expressing any opinion upon the effect legally of any of these documents. We have not had the benefit of hearing the officers of the Crown in answer to this application. The Court, in short, is almost completely in the dark, but we would be shutting our eyes to all probabilities, and be stolidly ignoring the achievements of science, were we to say that no documents existed, so far as legal evidence of them had been laid before us, because the information in regard to them, though it comes through the Government officers, is presented to us in the shape of an electric tele-

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gram, the mode of testing the authenticity and accuracy of which has not as yet been fixed by any canon in the law of evidence. That such documents do exist, I cannot doubt for a moment; but their exact terms we have to learn, before we can even yet act upon them judicially; till then we must defer proceeding under this application, and I have the less hesitation in doing so because it cannot affect the rights of the applicants. If they are entitled to have their goods, or to damages by reason of their non-delivery, that right will remain unaffected, except in so far as it may have been taken away, or may have been modified by legislative enactment, having the authority of all the three branches of the Legislature,—for nothing less can interfere with the power of this Court, to enforce the law, and to give the relief which the subject is entitled to demand from those by whom he has been injured, whomsoever they may be. If the three branches of the Legislature have concurred in passing such an Act as has been represented to us, then this Court, as to the particular matter, has become paralyzed, and ceased, as it were, to exist; and yet, though the applicants cannot succeed in obtaining an order which would set the judicial in direct conflict with the executive and legislative authorities—a state of matters which every wise and prudent person would, on reflection, exceedingly lament—they are not remediless. They can represent the matter to the Government, which, though it be anxious to provide a revenue adequate to the necessities of the Colony, cannot have any desire to injure individuals by the course it has taken to secure that object; and even if the Government should turn a deaf ear to their complaint, which I cannot anticipate, they have still the Parliament to appeal to. It is a popular body, in which mercantile as well as other interests are represented, and there is no reason to apprehend that if the injury to the applicants which they represent, and as it appears to me with truth, shall upon inquiry turn out to be founded in fact, the Parliament will apply the proper remedy and give the fitting redress.” On reaching my chambers this morning I found lying upon my table an affidavit by Mr. Field, as well as a copy of *Gazette Extraordinary*, containing an Act of Parliament, which appears

to have been passed in terms of the Constitution Ordinance. According to the Constitution Ordinance there is no provision as to when an Act shall come into operation, and we must therefore endeavour to gather that from the Act itself. Acts I think usually contain a clause in themselves fixing the time when they come into operation : but in this instance there is no such clause ; we must therefore refer to the Act itself and to the Constitution Ordinance, which provides that whenever a Bill shall have received the assent of the Governor the same shall become an Act, and shall be promulgated by publication in the *Gazette*. We have the authority of a telegram for believing that this Bill has received the assent of the Governor, and it has been published in the *Gazette* ; it is therefore an Act of Parliament of the Colony, and its 6th section says in terms that it shall, as to the matter there referred to, take effect from the 29th day of April. It has been argued that it is the duty of the Court to see that the written Constitution of the Colony is not violated. It has not, however, been shown that any article of the Constitution has been violated : when such a case occurs we will deal with it, but at present it is not necessary for us to consider what would be the power of the Court, if the Constitution Ordinance were to be violated. There has not been any breach of the Constitution by this Act of Parliament. It has also been argued that the Parliament of the Colony has no power to pass an Act *ex post facto*, but I do not see that there is anything in the common law, or in the statute law, or in the practice of the law of England, which prohibits Parliament from passing Acts which may be *ex post facto*, or that in doing so it would necessarily act with injustice. So long ago as the time of Coke, it was laid down by that great authority that it was possible for the Parliament to make an Act which was illegal by being contrary to natural justice, but which yet would be law, because the authorities and the subject would be bound to give effect to it. It is not for me to say whether this Act is of that nature, but having all the requisites prescribed, it is one which this Court is bound to carry out. The 6th clause of the Act declares : "And whereas the Governor did, on Friday, the 29th day of April, 1864,

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instruct the officers of the Customs at the several ports of this Colony to require all persons paying duties of Customs on imported articles after the said day to enter into a bond to pay such increased rates of duty as may be proposed by the Governor and sanctioned by the Parliament during the present session ; and whereas it is fitting that the Governor should be indemnified for issuing such instructions as aforesaid, and all officers of Customs indemnified for acting upon the same, be it enacted as follows : The Governor of the Colony, and all officers of Customs of this Colony, are hereby jointly and severally indemnified, freed, and discharged from all actions and proceedings whatsoever brought or instituted, or which may hereafter be brought or instituted against them in any of the Courts of this Colony for or in respect of the instruction aforesaid, or anything done, or to be done, in pursuance thereof ; and if any person, or persons who shall, under and by virtue of such instruction, have been required to enter into such a bond as aforesaid, and who shall have refused so to do, and who shall, by reason of such refusal, have been refused permission to pay Customs duties upon any article, or articles imported into this Colony, shall, whether before or after the taking effect of this Act, have brought or instituted any action, suit or proceeding against the Governor, or any officer, or officers of Customs, for or in respect of such refusal, such action, suit, or proceeding shall be dismissed, and the defendant or defendants shall be entitled to his or their full costs." Now, if I understand the argument of the applicants, it is that this section while it declares that if any suit, action, or proceeding shall have been instituted against the Collector of Customs, for making him liable in damages for the non-delivery of goods, such suit or proceeding shall be dismissed ; but it leaves untouched an application of the nature of the one now before us, namely—for delivering of the goods themselves without bond for the duty referred to in the instruction of the Governor. The expressions used in the section are not happy, but it could scarcely be expected that a Bill framed in so hasty a manner as this was, should be free from objection. But it is obvious that the Act was not intended to embrace such an application, and it would be to evade the

Act, if this Court gave an order in the terms asked. A Court is bound to act upon the spirit of the law, and it would not be justified in avoiding that spirit if the clause have the meaning contended, for that must be tried in a proper action, not in an application such as the present. In the meanwhile, the course of the parties is first to apply to the Government, and then to the Parliament; and if redress is refused them in both quarters, they will then know where to go to. I decline to make the order asked.

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CLOETE, J.:—I have listened with very great attention to the long and able address of the learned counsel, but have heard nothing to induce me to change the view which I took on perusing the *Gazette*, which I found on my table, which has been forced on our consideration, and upon which we are called for a judicial decision. The only question I had to consider in this case is, whether this *Gazette Extraordinary*, bearing date the 4th of May, and which has been submitted to us this morning, has the force of law, and has gone through the ordeal necessary to form it a portion of the law of the Colony. After hearing all that has been stated, I entertain not the slightest doubt that this *Gazette Extraordinary* is, in the words of the Act and the proclamation, such a promulgation as makes it binding upon all Her Majesty's subjects in the Colony, and that, *à fortiori*, every Court is bound to consider it as lawful, and that it is the duty of every subject in every section of the community to obey every law which has been duly proclaimed. The Constitution Ordinance provides that when an Act has received the assent of the Governor, and has been published in the *Gazette*, it becomes law, and we are all aware that there is good ground for believing that the Governor has assented to this Act. Therefore that question is set at rest; and the only point which remains for consideration is the sixth clause, the question being how that clause is to be construed, and whether the Court is competent to deal with it. It is very well known that in all countries which possess laws of this character, that the principles of those laws are opposed to the passing of Acts *ex post facto*. Acts of this kind should not be hastily con-

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sidered, and the Legislature should be careful in looking into the terms of an Indemnity Act, before they allow it to pass and to become a portion of the law. If the Legislature of this Colony has the power to pass a law which is to operate from its date, and there is no special provision otherwise, it may also pass a law which shall be binding prior to such date, and it is the duty of the community to obey such a law; and therefore I take this opportunity of saying that there is not a single word which I stated on Tuesday last which I should now wish to change. On that occasion I felt it my duty to say that the proceedings up to that day were wholly illegal and unprecedented, and I would now add that no British Minister, since the glorious Revolution of 1668, would have thought of going down to the House the day after Parliament opened, and have made such a proposal as has here been made. In His Excellency's opening speech, the Parliament having previously had nothing before it, he said: "I shall take an early opportunity of submitting to you a Bill for increasing the customs dues upon certain articles of import." This was the only notice which the people had of any proposal, or chance of a proposal, of this nature; and the day after this we find from an electric telegram that the proposal was made, and agreed to, to lay an embargo on all goods in the bonding warehouses, and directing the Collector of Customs to obtain from parties paying duties such and such bonds, with the further addition of sureties. I stated on Tuesday that I considered that proceeding to be illegal, and, in fact, a breach of the law, and we now see that the 6th clause of the Act admits that the act was illegal prior to the passing of the Act now before us. That the proceeding was unprecedented was shown from the references which were made to May's Parliamentary Practice, in which are laid down the form and proceeding observed in England. It is not on the first day that such a proposal is made that it becomes law, and it is not attempted to put an embargo upon all the commerce of the country because certain articles are to be subjected to a higher duty. (His Lordship referred at length to the proceedings in the House of Commons.) I am convinced that such a proposal as that made

by the Government would never have been entertained by a British Minister as, the day after the opening of Parliament, to lay an embargo upon all the goods in London and Liverpool, and at the other ports, which would create a very considerable stir, and complicate many of the transactions of men engaged in trade and commerce. But here the Government having submitted the proposal, the Parliament agreed to the same, without having before them so much as one of the articles upon which the duty was to be increased, and of which the mercantile community were in total ignorance. The House, too, thought fit to pass a section by which the Collectors of Customs are indemnified for all they may have done in respect to the previous resolution. This, however, is the law by which we are bound. It is a law which has been duly passed, and which must remain in force, unless it is brought to the notice of the Secretary of State within two years, and unless her sanction is refused by the Queen in Council,—the sole and proper channel in which objections to this Act are to be brought forward. But when we carefully regard this 6th clause, we find that it appears to go beyond what is commonly called an Act of Indemnity, for it not only indemnifies the Collector of Customs for what he has done, but it mulcts the applicants in any proceedings they may have taken against such Collector. It mentions nothing about such proceedings being illegal, but adds a clause by which the respondent is entitled to his full costs, and, therefore, such being the law, the present application must be dismissed, with costs against the applicants. I take this opportunity of saying that I am happy that we are relieved from the course which we should have had to adopt had we on Tuesday granted the order which was asked, wherein we were asked to declare as to the subject-matter. We could not but see that the respondent had not had an opportunity of stating such a case as might have been made out for him; he had not the opportunity of being fully heard; and we considered that an expression of opinion would be sufficient. I am happy that no order was then given, which would have involved the unpleasant and unseemly contest which must have arisen from the position we were placed in. Under these circumstances,

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the proceedings must be dismissed, with costs to the defendant.

BELL, J.:—I had intended to have refrained from saying anything about costs, and perhaps the respondent will refrain from asking for them. It would be most unjust to act in that way, and it could not be intended to act so, but must refer to proceedings commenced after the passing of the Act.

Dreyer :—We don't mean to ask for costs, my Lord.

BELL, J.:—Very well; the application is refused, but nothing is said about costs.

[Attorneys for the Applicants, FAIRBRIDGE & ARDERNE.  
[Attorneys for the Respondent, J. & H. REID & NEPHEW.]

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BOYES AND OTHERS, *Applicants*, vs. BRAND, *Respondent*.

*Parliament.—Constitution Ordinance.—Act No. 2, 1852, §§ 6, 53, 54, 55, 56.—Validity of Proclamation.—Interdict.*

*The Governor issued a Proclamation summoning the House of Assembly before the names of the members elected for a particular district were known, and such members were unable to be present at the meeting of the House of Assembly. On a motion by the above members calling on the Speaker to show cause why he was not illegally elected, and why the above proclamation should not be declared void: Held,—that as the applicants showed no continuing injury done to them, the Court would not grant an interdict.*

*Semble, the principle on which the Court grants an interdict is to prevent the infliction of a continuing injury.*

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Motion calling on Sir C. J. Brand, the Speaker of the House of Assembly, to show cause—

1st. Why certain proclamations dated 21st and 22nd of April shall not be declared null, void, and of no legal force or effect, for the reason in the said protest stated, and

for the further reason that the said proclamations which purport to have been signed by His Excellency the Governor of this Colony, were in truth and effect not signed by him, nor issued under his sign manual, as by law required.

2ndly. In case the said proclamation, No. 22 of 1864, shall be held to be otherwise sufficient in law, then to show cause why the time allowed in and by the said proclamation for all members elected to the House of Assembly to assemble together at Grahamstown, to wit, the space of six days, shall not be declared insufficient.

3rdly. To show cause why your election as Speaker of the House of Assembly shall not be declared to have been made in violation of the Constitution Ordinance of this Colony, because you were so elected in the absence of the representatives for the said electoral division of Clanwilliam, who had not been lawfully summoned, and could not therefore be personally present to take part and share, as they are and were of right entitled, in said election; and why such election shall not therefore be further declared bad, null, and void.

And 4thly. Why, by reason of the premises aforesaid, all the proceedings of the members for the several electoral divisions of this Colony, assembled together at Grahamstown, calling themselves the House of Assembly of this Colony in Parliament assembled, shall not be declared null, void, illegal, and of no effect.

And, 5thly, you will be further called on, as the Speaker elected by the members of the several electoral divisions of this Colony, save and except the electoral division of Clanwilliam, to show cause, if any, why you as the Speaker so elected as aforesaid, and the members of the several electoral divisions of this Colony so assembled together at Grahamstown as aforesaid, shall not be restrained from proceeding with any measures purporting to be legislative measures for this Colony or from otherwise exercising any legislative functions, or otherwise why the said applicants shall not have such other relief as the exigency of their case demands.

The applicants, Steele and Boyes, were members of the House of Assembly returned for the district of Clanwilliam. The results of the poll were made known at Clanwilliam on

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the morning of 21st April. On the afternoon of that day the Governor issued his proclamation summoning the Assembly to meet on April 27th. The names of the members from Clanwilliam were omitted in this proclamation, the returns for that district not being then known at Grahamstown. A second proclamation, dated the 21st, but not in fact issued till the 22nd, contained the names of the members for Clanwilliam. It was impossible for the applicants to arrive at Grahamstown by the 27th April.

*Watermeyer*, for the applicants, argued that the Governor had acted illegally in calling together the Assembly before all the returns were in fact known to him. Section 56 of the Constitution Ordinance empowered the Governor to issue his proclamation on receipt of the returns, therefore he had no power to do so until he knew the House of Assembly was duly elected, and composed of the forty-six members prescribed by section 6 of the same Ordinance. He had infringed the above sections and section 60. The first proclamation also was itself invalid, for it recited that all the districts had elected members, whereas in fact the Governor did not know that they had done so. The House being thus irregularly constituted, the election of a Speaker was invalid, and consequently its other acts were equally invalid.

The learned counsel also argued that the proclamations were invalid because they were not signed by the Governor, nor actually sealed with the public seal, although they purported to bear both the signature and the seal.

BELL, J. [after reading the heads of the notice of motion, proceeded]:—The counsel for the plaintiffs, in opening his case, said that, in terms the precise words of which I do not remember, it would be useful and convenient to the applicants to know the opinion of the Court in reference to the merits of the motion, with a view to another form of remedy, if the Court should refuse that now asked. It would, no doubt, be convenient for the applicants to hold a consultation with the Court, but the Court is not used to give opinions in that way. If a party should bring forward a claim for £20, he must do so by action, with pleadings properly framed. But here the Court is asked on a simple motion, without any

pleadings, to give its opinion as to the validity of documents supposed to affect the legality of the proceedings of so august a body as the Parliament of the Colony. It is asked upon this loose notice of motion to declare the assembling of the Parliament and all its proceedings to be null and void. There has been no precedent shown to us for such a proceeding on a mere notice of motion. If the parties desire to have the opinion of the Court on the first four heads of the notice of motion, the proper and legitimate way of obtaining it is by a regular action regularly brought. At present we are asked to give our judgment on so important and momentous a subject on a mere notice of motion, not only without pleadings properly framed, but at a time when we have not the assistance of the law officer of the Colony—the Attorney-General. Even if we had had the benefit of that assistance, the Court would have declined to give its opinion in the form in which the matter has been brought. The only branch of the motion which can be entertained, so far as form is concerned, is the fifth, in which an interdict is asked to restrain the respondent from sitting and acting as the Speaker of the House of Assembly. The Court does entertain applications for interdict without pleadings, and upon mere notice of motion, but only where a continuing injury is being inflicted which will be without remedy unless the Court interfere; but it has not been shown to us that the parties have sustained, or are sustaining, any injury by the sitting of the Parliament. In answer to a question from me upon the subject, the counsel for the applicants stated that the only injury was the forfeiture of their franchise for a time. It is not, however, correct to say that the applicants for any length of time forfeited their franchise. They were only deprived of the opportunity of exercising it for a short time. That, however, they can remedy so soon as they choose by taking their seats in the Parliament; there is no pretence, therefore, for saying there is a continuing injury, requiring the summary interference of this Court. If the applicants could have shown not only that they had been deprived of the opportunity of sitting in Parliament and voting at its first meeting, but that by that circumstance some injury had been done to them which was still in operation, there might have been

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some ground for asking the interference of the Court. But in the absence of anything of that sort, this Court has never interfered to restrain parties summarily by interdict. I don't intend to ventilate even the legality of the matters called in question by the four first heads of the notice, or to hint even how far this Court has or has not jurisdiction in regard to them. It will be time enough to do so when, if ever, these questions shall be brought before the Court. There are certainly cases in which the Court may be called upon to exercise its judicial functions in regard to matters arising out of the Constitution Ordinance; but whether these questions fall within the category I forbear at present to say; it is sufficient to say that they cannot be gone into on a mere notice of motion. The only proper way of proceeding is by a regular action. With regard to the fifth, we only interdict, when there is a wrong or a grievance proved *prima facie* to be continuing. No such thing has been alleged or proved here. I must add that the propriety of allowing these matters to be opened up so fully in this informal proceeding passed through my mind. It was a question with me whether the matter should not be put a stop to at once, as the proceeding could not, as to the greater part of it, by any possibility be successful; but it appeared to myself and my brother that it would be better to allow the party to proceed, and state his case, in order that we might see how far what was adduced might bear upon the 5th head of the notice of motion—the only one entertainable. I do not altogether repent allowing this course, although it has been at the expense of remarks on the Government which I must say are utterly groundless, and had better have been spared. The members for Clanwilliam, physically, could not reach Grahamstown in time for the opening of Parliament, inasmuch as the result of the poll was not known till the 21st of April, and the Parliament met on the 27th. That is indisputable; but it is equally indisputable that this was owing to the circumstance of a poll having been demanded by their opponent, and that no improper motives can be imputed either to the Government or to its officers. Whatever may have been the reason for the Government postponing the assembling of the Parliament for such a

length of time as apparently made it necessary to fix a day for its meeting which, as the event proved, was before the result of the applicants' election could be returned, there can be no question that to exclude the applicants from taking their seats was never intended by the Government; and that what it did, whether regular or irregular, had only in view a compliance with the law. There is nothing in the document to show that it ever was in the mind of the Government, or of any of its officers, to prevent those two gentlemen, or any other gentlemen, from taking their seats on the first day of the meeting of Parliament. If anything, in the anxiety of the Government to hold an early meeting of Parliament, was done irregularly, as to which for the present I say nothing, there was an utter absence of any corrupt or improper motive. I think, therefore, many of the observations upon this subject by the applicants had better have been spared. The application as to all its parts must be refused.

1864.  
May 24.  
—  
Boyes and  
others,  
*Applicants, vs.*  
Brand,  
*Respondent.*

CLOETE, J.:—This application appeared to me to be of so important a nature that I determined with my brother not to interrupt counsel, but to allow him to state his case, although it is manifest that he failed, in making use of the time of the Court, to show any serious grievance. It is true that Messrs. Boyes and Steele had not time to get up to Grahamstown in order to be present at the opening of Parliament. But counsel failed altogether to show that he had any grounds for applying for this summary mode of interdict. It is well known that by our practice this summary application may be made both by provisional case and by regular court motion. In the same way, regarding the rights of persons, there is a way by which parties having a clear right of possession may be summarily put in possession of their rights. But they must have a clear wrong to show, a certain alleged grievance to bring forward, and have some injury sustained to show, in virtue of which the Court may interfere. Although we have heard a good deal about irregularities, we have failed to hear a single word of a grievance. On the contrary, counsel said in answer to my brother as much as that the only thing they

1864.  
May 21.  
—  
Boyce and  
others,  
Applicants, vs.  
Brand,  
Respondent.

had to complain of was that they had not had the privilege of being present at the opening of Parliament and joining in the election of the Speaker. This involved, no doubt, a very important question, and one that had never been agitated, as far as he was aware, even in Great Britain, that the Parliament should be declared null and void in virtue of an informality. The only thing they could complain of was this, that although the Government fixed the 27th of April as the time they wished to open Parliament, owing to some delay of the returning officer, or the distance at which Clanwilliam lay, the members for this division were unfortunate enough not to be named in the list which was published in the *Gazette* of the 21st April. That point is very important, but it is not a defect that could prevent Parliament when they assembled to begin business, or to adjourn if they thought proper. I entirely concur with my brother that they have no immediate injury to complain of. They can attend and take part in all their proceedings. The damage done to them is very singular and very hypothetical, and there is no process we can give them to place them in their original position. I am of opinion the motion should be rejected.

[Solicitors for the Applicants, FAIRBRIDGE & ARDERNE.]

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A. vs. B. A. vs. C.

*Promissory Note.—Rate of Interest.—Duration.*

*A promissory note stipulated for interest at the rate of one per cent. per month if not paid when due :*

Held, per BELL and WATERMEYER, JJ.,—that as the Court will interpret the note most strongly against the creditor, the rate of interest only commenced from the time the note became due, and that it continued till payment.

Held, per CLOETE, J.,—that the stipulated rate of interest commenced from the making of the note and continued until

*judgment, and that the judicial rate of interest, viz. 6 per cent. per annum, was payable from the date of judgment till payment.*

Applications on two promissory notes for provisional sentences. The plaintiff was the same in both cases. The notes stipulated after the promise to pay "with interest at the rate of one per cent. per month and five per cent. for collection if not paid when due."

1864.  
Aug. 1.  
A. vs. B.  
A. vs. C.

The claim for collection was not pressed.

In the first case *Watermeyer* was for the plaintiff.

In the second case *Cole* was for the plaintiff.

BELL, J.:—As regards the note on which interest is claimed from the time it became due, viz. on May 1st, the plaintiff had a right to say that if he was entitled to the principal sum on that day, the interest should also be payable in virtue of the bargain at the rate of 12 per cent. per annum. The meaning of the words in the note was that instead of the creditor receiving the ordinary rate of interest which the law would allow him after the note became due, the rate was fixed at 12 instead of the usual 6 per cent. In regard to the other note, he might say that in all cases in which a doubt arose as to the meaning of a bargain, the Court would infer in favour of the debtor and against the creditor. The note might either mean that the interest was payable from the date of the note, or from the time at which it fell due, and therefore the Court would, on the above principle, construe it against the creditor. Therefore the note must be taken to mean that if there was any delay after the 1st of July, when the note became due, interest at the rate of 12 per cent. was payable. Therefore the Court would grant provisional sentence on both notes, with interest at the rate of 12 per cent. from the time they became due till the date of payment.

CLOETE, J., said that he considered that an important mercantile question arose on these notes, and he wished, therefore, to state his view. In his opinion the stipulation

1864.  
Aug. 6.  
A. vs. B.  
A. vs. C.

as to the payment of the interest referred as to its commencement to the date on which the note was given. It was quite legal for a person to stipulate to receive interest on a loan from the date at which the borrower received the cash. But he differed from the rest of the Court in thinking that when the time had expired during which the higher rate was payable, the parties fell back on the ordinary rate of 6 per cent., and he was of opinion that the note only intended the higher rate should continue till the note became due.

WATERMEYER, J., concurred with BELL, J., in thinking that in case of an ambiguity in a contract such as this it should be construed against the creditor. And therefore he considered that the rate of 12 per cent. could only be claimed from the time when the note became due. A note might be given for goods purchased, and then no interest could run from the time at which it was given. With regard to the continuation of the stipulated rate, he was of opinion that it should continue till the time of payment; for though there might be a recognised and judicial rate of interest, that was excluded by the terms of the contract as stated in the note.

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### HEATHERSHAW vs. HEATHERSHAW.

#### *Restitution of Conjugal Rights.—Adultery.—Divorce.*

*A husband, after living in adultery, sued for a restitution of conjugal rights against his wife: Held,—that the Court could decree restitution.*

1864.  
Aug. 21.  
Heathershaw vs.  
Heathershaw.

Action by a husband for restitution of conjugal rights. It appeared that in May the husband brought an action for divorce on the ground of adultery against his wife; but the case failed, as he was proved also to be living in adultery with one Sartjee van Grean. Two days after the

husband's attorney wrote to the wife, stating that this woman had left the husband's house, and directed the wife to return to her husband.

1864.  
Aug. 21.  
Heathershaw vs.  
Heathershaw.

*The Attorney-General*, for the husband, argued that the infidelity of the husband was not a bar to this action. He admitted that it was improbable that the wife would return, but there was a genuine wish to take back the wife, and no collusive arrangements between the parties.

CLOETE, J., said the Attorney-General had candidly admitted that the husband contemplated obtaining a divorce by means of the present proceedings, but the Court was bound to consider all the aspects of the case and to consider if a judicial order were made if the wife might not obey it. The wife might still have some feeling left for her husband, and as the wife had not raised any substantive plea against the granting of the order, the Court would decree restitution. He hoped that the husband in making this application was prepared to overlook his wife's misconduct, and that a reconciliation might take place. The wife would therefore be ordered to return to her husband within fourteen days from the service of the order upon her.

WATERMEYER, J., concurred.

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STONE vs. IMPEY.

*Interdict.—Bond.—Attorney.*

*A purchaser not having paid off a mortgage bond and notice having been given that judgment in the Circuit Court would be obtained against the vendor thereon, such judgment was obtained accordingly. On an application for an interdict to prevent the sale of the property under the judgment:*



Held,—that as the applicant was an attorney, he must be taken to know of the summons for judgment, and should have objected on the hearing thereon, and the application was therefore refused.

1864.  
Aug. 25.

Stone vs. Impey.

Motion to make absolute a rule *nisi* for an interdict to prevent the sale of certain property. The applicant, J. H. Stone, an attorney, in September, 1862, purchased some property from one W. Jenkins, on which was a mortgage bond for £100 held by the Eastern Province Guardian and Loan Insurance Company, the secretary of which was the respondent in the present case. Stone had paid off all the purchase money by February, 1863, but had not paid off the bond. Interest was paid on the bond up to March, 1863, but the company refused to renew the bond unless Stone made a new one in their favour. In August, 1863, the secretary wrote to Stone stating that the directors intended to apply at the next Circuit Court at Grahamstown for judgment against Jenkins. After the summons for judgment had been issued, Stone offered to pay the debt and interest, but not the costs, which offer was refused, and judgment was obtained against Jenkins.

*Denysen* was for the applicant.

*Cole*, for the respondent.

THE COURT refused to make the rule absolute, stating that the applicant, being an attorney, must be taken to be aware of the proceedings of the Circuit Court, and should have appeared when judgment was applied for in that Court, and raised any valid objection which he then might have had to the granting of the judgment against Jenkins (a).

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(a) NOTE.—It would appear that the *laches* of the applicant in not raising the objection sooner, having regard to his knowledge of the mortgage, etc., would have been sufficient ground for refusing the application. But the knowledge of the applicant *quâ* attorney is stated as the principal point of the judgment in the report.—EDITOR.

TRUSTEES OF HEINDRIKS vs. TRUSTEES OF THE GRAAF-REINET  
BANK.

*Insolvent Ordinance No. 6, 1843.—Bond.*

*Where one bond was given whilst the maker was solvent, and a second in substitution thereof when the maker was insolvent : Held,—that the second bond was not invalid under the Insolvent Ordinance, § 84.*

Action to set aside a bond given by the insolvent Heindriks in favour of the Graaf-Reinet Bank, on the ground that it was an undue preference in favour of the Bank. The facts of the case were shortly as follows:—In February, 1859, Heindriks and Meintjes, who carried on business in Graaf-Reinet, passed a bond in favour of the Bank for £3000. The bond was executed by Heindriks, and was intended to cover the bills which should come into the possession of the Bank. In 1860 the partnership was dissolved, Heindriks taking over all the rights and liabilities of the firm. In August, 1861, Heindriks gave a second bond to the Bank in the same terms as the first, to cover the same things, but it mortgaged also some property not set forth in the first bond. Before the granting of the second bond power was given to the Bank to cancel the first, but in fact it was not cancelled, the manager of the Bank being under the impression that all requisites as to the second bond had not been complied with. At the time the second bond was given Heindriks was undoubtedly insolvent. During the course of the argument, the Court said that the first bond must be treated as a cancelled bond, all proper steps having been taken for this purpose.

1863.  
Sept. 17.  
1864.  
Sept. 3.  
—  
Trustees of  
Heindriks vs.  
Trustees of the  
Graaf-Reinet  
Bank.

*The Attorney-General* was for the plaintiffs.

*Watermeyer*, for the defendants.

THE COURT now held that they must regard the first bond as cancelled, and that the second was not given with an intention to prefer the defendants over the other creditors.

1863.  
Sept. 17.  
1864.  
Sept. 3.  
—  
Trustees of  
Heindriks vs.  
Trustees of the  
Graaf-Reinet  
Bank.

The second bond was a mere substitution for the first, and if that had not been given, this would cover the liabilities of the insolvent. The second bond was not a new security, but merely the continuation of the first in another form, which was rendered necessary by Meintjes retiring from business, the liabilities being transferred to Heindriks alone. Heindriks it was clear was liable to make good the full extent of the first bond, and if the defendants had chosen to go upon that, they could have enforced it. It could not be said the insolvent had intended to grant any preference, for he did nothing of the kind, but simply to continue the existing security, and therefore the second bond was not open to challenge, except to a very small extent. In the first bond certain properties were specially mortgaged, and in the second an addition was made of certain other properties; and it might be urged that as far as regards these new properties, the bond was open to being challenged. But then the first bond was not merely a special mortgage, for it included all the property of the insolvent, and under that provision the properties specially set out in the second bond would have been liable.

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#### NETTLETON vs. KILPATRICK.

##### *Minors.—Trustee and Guardian.—Intoxication.*

*A trustee and guardian of minors will be removed by the Court from the appointment if proved to be guilty of habitual intoxication.*

1864.  
Sept. 29.  
Nettleton vs.  
Kilpatrick.

Motion that a rule *nisi* calling on Mrs. Kilpatrick, widow of W. Kilpatrick, to shew cause why she should not be removed from her appointment as trustee and guardian of the children of her late husband, and why she should not be prevented from alienating any part of the estate without the consent of her co-trustee (the present applicant), should not be made absolute. It was stated on affidavit that Mrs.

Kilpatrick was habitually in a state of intoxication, and had not accounted for part of the estate of her late husband, which had come into her hands as trustee.

1864.  
Sept. 29.  
—  
Nettleton vs.  
Kilpatrick.

The return of the rule *nisi* had been fixed for July 12th, and then extended to September 12th.

*The Attorney-General* was for the applicant.  
*Cole*, for the respondent, asked for further time.

THE COURT refused to give further time, and made the rule absolute, with costs out of the estate.

### TRUSTEES OF BOSMAN vs. DE VILLIERS AND HAUPT.

*Undue preference.*—*Insolvent Ordinance*, No. 6, 1843,  
§§ 84, 88.

*A trader having paid sums in respect of certain notes before they were due, when his circumstances were precarious: Held,—an undue preference within the Insolvent Ordinance, No. 6, 1843.*

Action for a declaration that certain payments made by Bosman, an insolvent, to the defendants, were undue preferences under section 84 of the Insolvent Ordinance, No. 6, 1843, and that this being a collusive arrangement under section 88, the defendants should be ordered to return the money.

1864.  
Oct. 13.  
—  
Trustees of  
Bosman vs.  
De Villiers &  
Haupt.

It appeared from the evidence that the insolvent surrendered on 21st August, 1863, the order of sequestration was made on 28th August. The defendants proved for £116. On July 29th, 1863, the defendants furnished the insolvent with an account of the amount due to them in respect of this business transaction with the insolvent, showing a balance against the insolvent of £170, for which he gave his note at three days' sight. On June 29th, the insolvent had given to the defendants three promissory notes, one for £104 13s. 2d., payable on July 22nd, one for £225, payable on 30th July, and one for £200, due on August 1st. On July 13th the insolvent paid to the defendants £200 in cash, £200 by a note of A. Brink, and £400 by a note of the insolvent's brother,

1884.  
Oct. 13.  
Trustees of  
Bosman vs.  
De Villiers &  
Haupt.

T. D. Bosman. On July 28th the insolvent paid £35 more, and for the balance, £170, gave a note payable in three days. On August 6th the insolvent paid £54 in respect of the last-mentioned note, leaving a balance of £116. It further appeared that previously to the insolvent giving the defendants his brother's note for £400, they held the title deeds of his farm, and these they gave up on receiving this note. The insolvent was a cattle dealer, and returned from his last togt on July 28th, without bringing any cattle back. He expected some cattle in April.

*Denyssen*, for the plaintiffs, argued upon the evidence that the statute applied to this case.

*The Attorney-General*, *contra*.

THE COURT having consulted together proceeded to deliver judgment.

CLOETE, J.:—In construing the 84th and 88th sections of the Insolvent Ordinance, the Court was bound to look into the hearts and bosoms of the parties, in the endeavour to ascertain whether at the time of an alleged preference being made, the insolvent must be taken to have contemplated the sequestration of his estate, and in respect to that, they could not go beyond the principle laid down by the Privy Council in the case of Taylor, in which it was declared that whenever a person in business came to see that unless he obtained delay from his creditors he must become insolvent, he must then be taken to contemplate the sequestration of his estate, and that if under such circumstances a preference was given to any creditor, it must be held that the intention was to prefer. After reviewing the facts as proved in evidence, his Lordship remarked that the defendants appeared to have taken from the insolvent a pledge of the title to his landed property, which they refused to give up without receiving a sum of £400 in lieu thereof, and the insolvent, with a view to raise money to meet some notes and summonses against him, prevailed upon his brother to give him an advance of £800 upon those deeds. Of this £800, one half went to the defendants, who then gave up the titles, and the insolvent

used the other half for the purpose of paying off other creditors. The insolvent then requested the defendants to make up his account, which was done, and giving the insolvent credit for the £400 and the £200 and debiting him with the three notes falling due on the 22nd, on the 30th, and on the 1st of August, left a balance of £170 against him. The defendants having given up the title deeds, which they had previously held, in return for the £400, that transaction might be considered as not being challengeable; but, on the other hand, the balance of the remaining £400, after deducting the vendue accounts which were payable as cash, must be regarded as a preference. In his opinion, the judgment should be for the plaintiffs for £132 13s. 2d., being the balance of the three notes, the £35 and the £54 paid in August, making in all the sum of £218 13s. 2d.

1864.  
Oct. 13.  
—  
Trustees of  
Bosman vs.  
De Villiers &  
Haupt.

WATERMEYER, J., said he fully concurred in the judgment just given. He thought it was impossible to hold otherwise than that during the whole of July the insolvent contemplated the sequestration of his estate. The insolvent at that time was indebted to the defendants for vendue accounts and for promissory notes to the amount of £530, which were not due at the time of the transaction which was challenged. With regard to these vendue accounts, it appeared that the larger purchases took place in May and June, the payment being made in June and July, and notwithstanding the contemplation of sequestration, he thought that the payment made on account of these vendue notes were payments in the due course of business. The vendue sales were sales for cash, and it thus did not appear to him that any preference was made before 15th July, when a payment of a promissory note was made which was fairly challenged. On the 15th July, when the three promissory notes were not due (as they had to run to the 22nd, the 30th, and the 1st of August), the defendants held a pledge of the insolvent's title deeds. The insolvent wished to have these deeds in order to obtain money upon them from his brother, and he (Watermeyer, J.) was of opinion that the defendants having claimed that they should be paid £400 before they gave up the title deeds (although this pledge would be of no

1864.  
Oct. 13.  
—  
Trustees of  
Bosman vs.  
De Villiers &  
Haupt.

value in an insolvency), and there was no proof that the defendants gave it up in contemplation of the insolvency of Bosman, or that there was any collusion between them, the defendants were entitled to keep that amount. But then the insolvent went out of his way, and while contemplating his sequestration—knowing, or being taken to have known, that within a very short time that his estate must be sequestered—he paid the notes which had not then fallen due, and in thus making a payment beyond the other £400 he must be taken to have intended to prefer. Had these notes been taken up when they fell due, the transaction could not have been challenged under the 86th section of the Insolvent Ordinance, because they would then have been payments in the ordinary course of business. This, however, was not the case, for the insolvent resolved that he would pay notes which were not due, and would not pay Porter, Hodgson & Co., and Van de Byl, to whom he was largely indebted, and therefore it could not be taken that he meant anything else than to prefer the defendants. The fact that on a former occasion the insolvent had done the same thing and had paid the notes of the defendants before they were due, did not bear on the subsequent transaction at all, for if insolvency had then supervened those payments would then have been challenged, and the same result would have followed. The payments, therefore, which the insolvent had made beyond the £400 must be taken to have been made with an intention to prefer, which would be met by the 84th section of the Ordinance. The subsequent payment on the 28th of £35, and the £54 in August, must also be set aside. The judgment would be for the plaintiff for £218 13s. 2d. It had been said in the course of the case, that the arrangement between the insolvent and the defendants was an ordinary one. The auctioneers charged the commission of 2½ per cent. on their advances, and when the produce of the togt was brought in they sold it, and got their commission again, so that whether the togt-gaugers made a good trip or not, they were always well off, and the merchant did not get anything until after the auctioneer had been paid in full.

Judgment was given for the plaintiffs for £218 13s. 2d. with costs.

## DE MARILLAC vs. KLATSEN.

*Provisional judgment.—Promissory note.—Set off.*

*On an application for provisional judgment, defendant objected that plaintiff had agreed to give credit for certain receipts :  
Held,—that provisional judgment must be granted.*

Application for provisional judgment on a promissory note for £62. It was alleged by the defendant that he signed the note and made an arrangement with the plaintiff that he should be allowed to set off against the claim any receipts which he might have in respect of previous payments for which he had not been given credit.

1864  
Nov.  
—  
De Marillac vs.  
Klatzen.

*The Attorney-General*, for the plaintiff, argued that even assuming the defendant's version was true, yet this was not a reason against provisional judgment on a note which was *primâ facie* good, in respect of which no fraud was alleged, and which was not wholly extinguished by another document.

*Cole*, for the defendant, argued that the plaintiff could not claim judgment on a note in respect of which he had agreed to allow deductions.

THE COURT held that though the plaintiff's account was on its face exorbitant, and though the defendant seemed to have some meritorious defence to part of the note, yet that there were not sufficient grounds for refusing provisional judgment. But execution would be stayed till the 15th proximo to allow defendant to go into the principal case.



## FORRESTER vs. RORKE AND OTHERS.

*Writ of attachment.—Revival.*

*A writ of attachment, which has been enforced, cannot be revived if the defendants are released at the request of the plaintiff.*

1864.  
Nov. 19.  
—  
Forrester vs.  
Rorke and  
others.

Motion for leave to revive a writ of attachment issued against Rorke and others in their capacity as executors of one R. Forrester. The writ of attachment had been issued because the defendants would not file an account. They were arrested by the sheriff, but on the same day, on an order from the plaintiff's attorney, were released, as they had promised to file their accounts immediately. The accounts being so meagre that the master would not accept it, this motion ensued.

*Cole*, for the motion, argued that the defendants had been arrested for disobedience to an order of the Court, and therefore that the writ could be revived.

THE COURT held that the plaintiff had allowed the defendants to go out of custody at her own wish, and therefore could not now come to the Court and ask them to revive a proceeding which had been duly executed. The plaintiff must apply for another writ if she could show any grounds for it.

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THE SOUTH AFRICAN MORTGAGE AND INVESTMENT CO.  
vs. McMASTER.

*Shares.—Arrest.*

*Shares in certain undertakings were ordered to be arrested to prevent their alienation.*

Motion *ex parte* for an interdict and arrest against certain shares in the Eastern Province and three other banks the property of the defendant. The latter, who was partner in the dissolved firm of McMaster & Crump, had resided for some years in England, and came out to settle the affairs of the firm. He took over all the assets and liabilities of the firm, and having scheduled a schedule of the same to the plaintiffs, they took them over on certain terms. It turned out, however, that the statement was altogether inaccurate, and they were now liable to claims far in excess of the assets. Under these circumstances the application was made to prevent the alienation of these shares.

1864.  
Nov. 24.  
—  
The South  
African Mort-  
gage and  
Investment Co.  
vs. McMaster.

*The Attorney-General, for the plaintiff.*

THE COURT made the order against the four banks, subject to notice being given to the defendant in England of the order of its execution.

PETERSEN vs. THE GREEN POINT MUNICIPALITY.

*Municipality.—Sale.*

*An action was brought against a municipality for the purchase money of a piece of land: Held,—that under the Municipal Ordinance the action was not maintainable, the municipality having acted ultra vires.*

Action to recover £67, being the purchase money of five lots of ground purchased in September, 1861, by the secretary of the Green Point Municipality, under the autho-

1864.  
Nov. 24.  
" 29.  
—  
Petersen vs.  
The Green Point  
Municipality.

1864.  
Nov. 24.  
" 29.  
—  
Petersen vs.  
The Green Point  
Municipality.

rity of the Commissioners, such act being subsequently confirmed by them. After such sale the Commissioners entered on and took gravel from the land. It was proved that the land had been bought for the purpose of the gravel at auction where it was going cheaply. It was to be paid by instalments. A meeting of householders had approved of the purchase, and sanctioned a rate towards paying purchase money.

*The Attorney-General* was for the plaintiff.  
*Cole*, for the defendants.

CLOETE, J., said that by the Green Point Municipal Ordinance the Commissioners were prohibited from purchasing landed property, and both the Commissioners and the other party to the transaction must be taken to be aware of this legal enactment. The sale could not have been made, and consequently the transaction was void. As, however, all that the defendants required was the gravel, he was of opinion that the parties should agree as to the value, and that judgment should be given for that amount.

WATERMEYER, J., concurred.

[Attorney for the Plaintiff, TENNANT.  
Attorneys for the Defendants, FAIRBRIDGE & ARDERNE.]

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#### PREUSS AND SELIGMANN vs. PRINS.

*Promissory note.—Forgery.—Liability.—Endorsee.*

*A. and B. having obtained the signature of C. to a document, fraudulently turned it into a promissory note and passed it to D. for valuable consideration, who in his turn endorsed it to E. In an action by E. on the note*

*ainst C: Held,—that as he had never made the note,  
 1 the plaintiff had obtained his title through a forger,  
 as not liable on the note.*

on a promissory note for £54 15s. by the plain-  
 tiffs and endorsees, against the maker.

*by-General* was for the plaintiffs.  
 defendant.

and points argued are set out in the following

NOTE, J.:—On the 25th of August last provisional sentence was claimed by the plaintiffs against the defendant for payment of a promissory note for £54 15s., signed by the defendant on the 24th of February last, and payable four months after date. The note was endorsed by Terbrugge, and subsequently by Arnoltz, who passed it to the present plaintiffs. When this claim was brought forward, on the provision, the defendant, by his counsel, admitted the truth of his signature, and not only denied having passed the note, but proved to the satisfaction of the Court, by the affidavit of the plaintiff himself, and of the first endorser, Terbrugge, that the whole of the instrument was a forgery, and that the document was forged in the following extraordinary manner. Terbrugge, who at that time was about to be brought to trial at Tulbagh, had made a statement in which he narrated the whole of the circumstances connected with the forgery. He stated that himself and a companion, Slier, wishing to obtain money for the purpose of leaving the Colony, put their heads together as to how this could be done. Terbrugge, who was quite a young lad, acting under the advice and instructions of his companion Slier, was induced to go to the defendant and purchase from him a couple of muids of oats for the sum of about fifteen shillings. Having done so, Terbrugge told Prins, from whom he had purchased the oats, that he had done so for another person, and that he required a voucher for the money. He then produced a pencil memorandum acknowledging the receipt of the fifteen shillings, and upon this understanding Prins signed it in ink. The pencil writing

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was then effaced by means of india-rubber, and the whole of the receipt so given for the payment of this small sum having been erased, the paper was converted into the promissory note for £54 15s. now sued upon. This document was then passed to Arnoltz, from whom Terbrugge received valuable consideration, and by Arnoltz the note was passed to the present plaintiff. In the meantime Terbrugge had been put into prison, and he (Cloete, J.) could not but regret that the second party was not brought to justice, he being the prime mover in the proceeding. These facts were, however, proved to the satisfaction of the Court, which therefore resolved to suspend its judgment, as this appeared to be a perfectly novel case, and although the learned counsel had brought forward several authorities somewhat bearing upon the principle involved, the Court considered that so novel a case should be sifted in all its aspects, and that they should take time before delivering judgment. Another reason for postponing judgment was, that as he was about to proceed on Circuit, and the prisoner Terbrugge was to be tried at Tulbagh, he thought it was possible that by the examination of the witnesses he might ascertain all the circumstances under which the note was passed. This, however, was rendered unnecessary by Terbrugge throwing himself upon the mercy of the Court, and confessing the truth of the charge which had been brought against him. He did not now think it was necessary for him to go into all the cases which had been adduced from the English Courts, as it had been admitted that most of them applied to cases of falsification, in which a change had been made in cheques or in orders upon bankers, and in respect to all which cases it might be said that they turned upon the principle as to who was to bear the loss, in the event of such falsification; and thus instead of taking a single sentence in an English Court, it had appeared to him, it would be more desirable for the Court to lay down the principle which it felt bound to follow when it appeared that the usual authorities were silent. Whenever a document was proved to have been a forgery, the person whose signature it purported to bear would not be held liable provided he could show that the instrument was not executed by him.

When any person had affixed his signature to an instrument the amount of which had been changed in such a manner as was calculated to deceive a person acting with ordinary business-like skill, the maker would only be responsible for the amount at which the document was originally fixed. But if by means of any gross carelessness or neglect in drawing out such a note or bill of exchange an opportunity for the committal of a fraud was afforded, in such case the maker was liable to the full amount of the note or bill when it passed into the hands of a *bonâ fide* holder before maturity. Smith in his Mercantile Law laid it down that when the name of the acceptor has been written on a promissory note form, without the amount having been filled in, he was liable to the full amount which would be covered by the stamp. These were the general principles applicable to questions of this nature, and when he looked at the note now sued upon, he was forced to say it was not such a draft or acknowledgment of debt when the defendant attached his signature to it. The original document was not an acknowledgment of debt at all, but a mere receipt for a small sum of money, which any person making a payment had a right to claim, the more especially as was explained by Terbrugge, he was merely purchasing goods for another person, and upon good faith that the statement was correct, Prins attached his signature to it. Terbrugge then turned the receipt into a blank sheet of paper and then converted it into a promissory note and acknowledgment of debt. If the Court were to depart from the principles already laid down, no person would be safe, because every receipt which had been given for thirty, forty, or fifty years might be turned into promissory notes. The body of the writing might be obliterated by chemical means, and the signature retained. Persons, too, who were in the habit of giving autographs might find themselves saddled with obligations amounting to hundreds or thousands of pounds, or persons who were in the habit of writing their names in their books would run the risk of the leaf being torn out and the paper converted into an acknowledgment of debt. He held that when culpability had not been proved, or unbusiness-like conduct been committed, the person who signed the docu-

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ment was not liable for any alteration in the amount. The plaintiffs in the present case would have their recourse against Arnoltz, who would have to look for his remedy from Terbrugge. On these grounds he was clearly of opinion that the document sued upon was a false one, that it had been falsified without the slightest act of the defendant having led to it, and that he was not liable to pay the same. The plaintiffs were bound to seek this remedy from the party from whom they derived their title, and judgment must therefore be for the defendant.

**WATERMEYER, J.:**—In this case the plaintiffs, as holders of a promissory note for £54 15s., claim the judgment of the Court. The defendant's signature is genuine, but he denies that the note is his. He had sold some articles of small value to one Terbrugge, who brought him a receipt to sign, written in pencil, which, at Terbrugge's request, he signed. The signature was in ink. Over it, Terbrugge, having effaced the pencil, wrote in ink a promissory note. The plaintiffs discounted this promissory note, or received from the person who had got it from Terbrugge, in due course of business. When it became due, the plaintiffs demanded it of the defendant; the fraud of Terbrugge was discovered, the defendant refused to pay, and Terbrugge being insolvent, the Court had now to decide whether the plaintiffs or the defendant must lose the money. It is clear that this is a forgery. The signature is genuine, but the false and fraudulent writing over the genuine signature, in the circumstances detailed, is just as much forgery as would have been the case if the signature had been counterfeited. The general rule is, that when an instrument is forged, the apparent debtor on that instrument is not liable. No title can be derived through a forgery. The forger who transfers to another the right he has, transfers no right at all. The person who has dealt with the forger must look to him, in whom, unwarily, he has had confidence, that what he produced was a genuine writing. There is no distinction in principle in the application of this rule, whether the whole instrument has been forged, or the sum or the material part has been falsified over a genuine signature. (*Van der*

*Kessell*, Th. 871, 872.) Yet sometimes the writer of a genuine signature may be held bound to make good a loss sustained through a forgery committed over it. The question is whether this is one of those cases. In the argument, the attention of the Court was directed to the case of *Young vs. Grote* (a), in which a cheque for £50 had been so carelessly drawn, that the agent who presented it, and who had previously filled it up, was enabled to introduce the figure "3" before the figures "50," and the words "three hundred" before the word "fifty," and it was held that for this culpable negligence the drawer, not the banker who paid the cheque in its altered state, should be liable. This case and another, *Hall vs. Fuller* (b), in which a draft for £3 was changed into £200, where the banker who paid the altered draft was held liable, though the forgery was such that common observation could not detect it, afford examples—the latter of the rule that the person who deals with the forger, and accepts from him the forged instrument, has done so at his peril,—and the former of the circumstances in which the writer of a genuine signature may be held liable, as having by his act directly aided the deception. In exact accordance with the conclusions of these English cases, Pothier, in the passages read by my brother, has drawn the just distinction. (*Pothier, Contrat. de Charge*, Pr. 99, 100, 101.) The rule is, that the simulated drawer of a forged bill is not liable to the acceptor who has paid it, the simulated drawer of a forged cheque is not liable to a banker who has paid it. But sometimes the drawer of a bill may be held liable to an acceptor who has paid a larger sum than was originally drawn, or the drawer of a cheque may be bound to reimburse the banker who has paid an amount beyond what was originally in the cheque, which had been increased by forgery. Pothier says, in fact, where the draft is so drawn that the sum as intended by the drawer has been so negligently written that it may be easily increased tenfold, and this is done,—the mandatory, i.e. the banker or acceptor, who has paid the larger amount, must be reimbursed by the mandant, the drawer, who has led by his own negligence to

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(a) 4 Bingham, 253.

(b) 5 Barnewall and Cresswell, 750.



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the forgery and consequent loss. Where the sum is altered, however, in such a way as even to deceive the most careful and intelligent man, unless there have been such negligent conduct on the part of the mandant as above described, the acceptor who pays, or the banker, must be the loser. It will be observed, even when the drawer is liable, the instrument itself does not become a genuine one, nor can be treated as such, as against the drawer. The whole of the reasoning depends on the reciprocal obligations of mandatory and mandant. This relation exists between the banker and his customer, between the drawer and the acceptor of the bill. If the banker have funds of the customer in his hands, he is bound to honour the draft with a genuine signature. If the drawer has a right to draw, the drawee is bound to accept. Before the existence of cheque or bill, the relation of intending drawer and banker or other drawee was in existence, or presumed to be in existence. This relationship existing, if the negligent misconduct of the mandant, or principal, has led the mandatory or agent to pay more on his behalf than he would have done but for this negligent misconduct, the agent or mandatory has an action for the restitution of money thus paid, as he thought, and was justified through the principal's negligent conduct in thinking, for the principal. It was his duty to honour the draft, which was a genuine mandate to a certain extent, and if, through the fault directly of the principal, in the manner of writing the draft falsification was rendered easy, the mandatory was not to be the loser. *Justissime procurator allegare potest non fuisse se id damnum passurum si mandatum non suscepit.* And again: *Æquam est nemini officium suum damnosum esse.* While I perfectly concur with Pothier in thinking that the true sense in which the drawer of a cheque or bill, the amount of which has been fraudulently altered by the holder, can be held liable to the acceptor or banker who has paid it, is on the principle of damage suffered in the due execution of a mandate through the principal's negligence, I do not desire it to be concluded that there may not be such consequences of negligence in similar matters where the relation of mandant and mandatory does not exist. A promissory note contains no mandate. It is a written

undertaking by the maker to pay to any holder deriving title through the payer the amount of the note. If that amount has been altered, the usual result of forgery follows—the alteration is to the detriment of the holder, not of the maker. But if the note has been written in the same manner as the cheque before mentioned, in so grossly negligent a manner as to invite the forgery, the maker would be liable to the *bonâ fide* holder, who has suffered through the payee's fraud, so directly assisted by the maker's negligence as, in regard of the holder, almost to make the forgery the maker's act. The maker is legally in direct relation with the holder, whom in his note he has directly undertaken to pay; he has directly undertaken this with the sole condition that the holder shall derive through the payee; and if, dealing directly both with payee and holder, he has been so grossly negligent as to place the payee in a position to practice deception undiscovered, and with no chance of discovery, he, and not the *bonâ fide* holder, would be liable. In contracts generally,—and a promissory note is a contract between the maker and the holder, through whatever number of hands the instrument may have passed, *culpa lata præstatur*,—the contracting party is liable, at all events, for the loss which his extreme negligence, his ignorance of that which he should have known, or his omission of that which he should have done, has occasioned. The doctrine which applies to the liabilities of makers of notes, if amounts have been altered, as the natural result of this gross negligence, applies also to acceptors of bills, who by their acceptance promised to pay *bonâ fide* holders the amount in the bill. Thus, although he ordinarily would not be, an acceptor may become liable for an alteration after acceptance of the amount. But all these cases of liability for alteration, by drawer, maker, or acceptor, are exceptional. No holder of a bill or promissory note is, in point of law, a stranger to the acceptor, or drawer, or maker. He is not intended to be a stranger. Therefore it is, I consider, that the drawer and acceptor in blank are liable to a *bonâ fide* holder for any amount which may afterwards be written in the bill, at all events for the amount which the stamp, when stamped paper is required for a bill, will cover. And in like manner the

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maker of a blank promissory note. The person charged as liable has by his own act declared his intention of being bound to the *bonâ fide* holder for the inserted sum. If the inserted sum is more than he had authorized his agent to insert, that is a question between them. It is observable how carefully Story, in his Commentary on the Law of Promissory Notes, lays down how the maker of a promissory note signed in blank becomes liable (p. 13, par. 10). He says, "It is very common for persons to sign their names in blank on paper for the purpose of having a promissory note over it. And in such a case the note when written will bind the party, if done by a person properly authorized, in the same manner, and to the same extent, and from the same time, as if it had been originally filled up before the signature was made." If the reasoning be correct that the signer is not liable where a blank signature clearly given for a special purpose is fraudulently diverted from that purpose, and a forgery committed over it, it follows, *à fortiori*, that where the signature is not in blank, but placed below a written receipt, which is effaced, and a promissory note is fraudulently written over it, no liability on the part of the writer of the genuine signature, but not the maker of the false promissory note, can be created. It cannot be said that the defendant was wholly free from blame. He did not exercise the caution which a more careful man would have exercised in signing his name under a pencil writing. But there is not, and never was intended to be by him, any relation between him and the plaintiffs, as there would have been had he signed a blank promissory note, or a promissory note in pencil, which could easily be changed. The plaintiffs were defrauded by Terbrugge, with whom alone they, or the person through whom they got the note dealt, and there is nothing to take the case out of the general rule, that the holder through a forger, has no better title than the forger himself. Having fully stated the reasons for my opinion, I wish merely, in addition, to call attention to the extreme strictness with which the Courts in England enforce the rule that title cannot be derived through a forgery. In the following case there certainly was great neglect on the part of the plaintiff, who executed the blank

transfer of the shares, and the fact that the broker whom he trusted to fill up the blanks had custody of a box of papers, the fraudulent opening of which enabled him to complete the forgery, so that no suspicion of anything wrong could be entertained by the most cautious, exonerated the purchaser from any, the slightest, imputation of carelessness in dealing with him. Yet the purchaser was bound to give them up. I refer to *Swan vs. North British Australian Company (a)*. The plaintiff wishing to sell certain shares, of which he was the owner, was induced by his broker to execute a transfer, leaving a blank for the broker to insert the numbers and description of the shares. The broker fraudulently filled up the blank with the numbers and description of other shares belonging to the plaintiff, but in a different company, namely, that of the defendants, and passed the transfer as a genuine transfer to a purchaser. By the rules of the defendants' company it was necessary to produce certificates of the shares before a purchaser's name could be entered on the register as the holder of the shares. The certificates of the shares in question were kept by the plaintiff in a box in the broker's custody. The box was locked and the plaintiff kept the key. The broker, however, managed to get a duplicate key, and stole the certificates, and produced them with the transfer, and the name of the purchaser was registered. In an action by the plaintiff claiming damages, and a *mandamus* to have his name restored to the register in respect to the shares: *Held*,—*dissentiente* Keating, J., that the plaintiff had been guilty of no false representation or culpable negligence such as stopped him from charging that the transfer deed was a forgery. It does not occasion surprise to learn that in the Court of Exchequer the Judges were equally divided on the question of the plaintiff's liability for his negligence, and that the same thing occurred in the Court of Common Pleas. I am not prepared to say whether the judgment of the majority or the minority of the Judges in the Exchequer Chamber would be that which this Court in a like case would be bound to give in applying the principles of the Roman-

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(a) 31 L. J. Ex. 425; 32 L. J. Ex. 273.

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Dutch law. I merely refer to the case to point out how very far the doctrine of no title being obtained through a forged instrument is carried. For the same purpose I draw attention also to the case of the *Bank of Ireland vs. The Trustees of Evans' Charities* (a). To make a person liable on a blank signature, it is at least necessary that an instrument of the nature actually written over it should have been intended by the signer in blank to be written over it. A man intending a bill or note, is presumed to know his responsibilities, if a bill or note be written. But if a blank signature be given for a wholly different purpose,—if, when the collecting of autographs was in vogue, a fraudulent autograph collector wrote promissory notes over such autographs as would admit of this,—if, while franks were in use, a promissory note were written over the frank,—notwithstanding some negligence on the part of the writer of the genuine signature, it would not be contended that, a forgery having taken place, he must be liable. In the case of the *Queen vs. Hales* (b), the leading case in the State Trials which established that fraudulent writing over a genuine signature is forgery, a promissory note to the amount of £6,000 was written over a frank,—the signature above being at that time sufficient for a frank. If the forger had succeeded in negotiating the note, and obtaining the money, the person from whom he obtained it would have dealt with him at his peril. The writer of the frank could not be liable, though some neglect might be imputable to him. There could be no relation, and never was intended to be any relation, between him and the holder, no contract between them to which neglect would be applicable. The holder and the forger would alone have contracted, on the credit of the forger, that the note was genuine. There is no distinction in principle between this kind of case and that in which a blank signature is stolen from my desk, or my name on the blank page of a book is torn out of the book. The person who deals with the man who defrauds must look to him. Fraud, forgery, theft, give no title, and through them none can be derived. If these principles be applied to the present case, the conclusion is clear.

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(a) 5 House of Lords Cases, 389.

(b) 17 Howell's State Trials, 161.

CLOETE, J., considering all the circumstances, the fact of the case being a novel one, and the importance of the question, ordered that each party should pay his own costs.

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Judgment for the defendant.

# TRUSTEES OF BRINK vs. MECHAN AND OTHERS.

*Donation.—Sequestration.—Inchoate instrument.—Endorsement of securities.*

*A deed of donation purporting to give a sum of money to certain individuals, but with the condition that the donor should retain the management of the fund, and have the use of the interest during his life, can only take effect after the death of the donor, and is therefore of no validity against creditors.*

*The endorsement of securities without delivery to the person to whom the endorser intended to transfer them does not take the property therein from the endorser, and if he becomes insolvent, they form part of his assets.*

Action to set aside certain documents and for a declaration that certain endorsements were invalid.

It appeared that on the 14th September, 1860, Andries Brink, now an insolvent, executed a deed of donation by which he granted to each of the four of his grandchildren the sum of £1,500, under certain conditions. Among these was one that the sum of £6,000 should remain entailed with a burden of *fidei commissum* during the lifetime of the donor's grandchildren, the donor retaining the administration of the capital during his lifetime, and receiving the interest thereof, but they were to receive the interest after his death. On May 13th, 1863, Brink executed a notarial bond whereby he bound himself by person and property as security for the sum of £6,000, according to the terms of the deed of 1860.

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This was duly registered, and in the following November Brink's estate was placed under a compulsory sequestration. Among the insolvent's papers were certain mortgage bonds, policies of assurance, and other securities, each endorsed by him, and purporting to be a cession to the defendants in part settlement of the donation under the above deed. In consequence of these endorsements the plaintiffs could not bring the same into the assets of the estate, and they brought this action to set aside the deed of 1860 and the bond of 1863, and to obtain the cancellation of the above-mentioned endorsements.

*Cole*, appeared for the plaintiffs.

*The Attorney-General*, for the defendants.

CLOETE, J., having reviewed the facts (as above stated), said:—The first question to be decided is, what was the effect of the deed of donation which the insolvent Brink proposed to make in 1860? On the 14th of September, 1860, Brink, who at that time, as everybody knew, was a person who enjoyed unbounded credit, such a question as that of his solvency not having occurred to any one, thought fit to make a donation before a notary public. That deed of donation contained some stipulations of an extraordinary character. The first of these was that the capital should remain burdened with a *fidei commissum* during the lifetime of the donor, but that he should have the administration of the capital, and receive the rents or *usufruct* thereof. After his death the fund was to be administered by the executors of his estate, but the interest should be enjoyed by his grandchildren. If the grandchildren were married, they were to receive the whole, and if unmarried only one half of the interest, but at their death the capital was to go to their lawful representatives. At the foot of this document was written an acknowledgment, signed by the defendants, thankfully accepting the donation. This deed of donation was not registered at the time of its being made. There were then two questions which arose,—was this a donation, a donation *mortis causa*, or a donation *inter vivos*? Was it, in fact, a complete, final deed of donation? It is

true that the only authority bearing upon this question is contained in *Grotius*, who lays it down that by the Roman law all donations over a certain sum, except for certain purposes, such, for instance, as for the release of a debtor from custody, or for gifts to the Emperor, are not valid unless they have been notified publicly and entered in a book; but of which practice *Grotius* says, "I find no example in our laws." But here I must say, as has been recently said of another writer, "Here I think *Grotius* is in error." For the practice was noted by *Van der Keessel* and by *Voet*, the latter of whom states that donations of more than 500 *ectari*, to be valid, must have been registered. The *ectari* was considered as about equal to the Dutch ducat, a little over sixteen shillings, and therefore all deeds of donation *inter vivos* over a certain sum must be registered in this Colony to be binding. It appeared to me that all deeds of donation above the value of about £420 must be null and void in this Colony without registration, but I feel bound to remark upon this question, without deciding it judicially, that the clauses of the deed render it extremely doubtful whether it can be considered as a *bonâ fide* legal deed of donation at all. In fact, it appears to be nothing but an attempt on the part of the insolvent to be very astute, and to pass a deed under which, after his death, a certain sum of money should be used in a particular way. The deed is nothing more than an inchoate instrument, purporting to give to the maker's executors a sum of £6,000, to be set aside for the alimony of his grandchildren, the capital to revert to his successors in the third degree who do not accept the gift, and who might not yet be born; and I doubt much whether such a deed is legal or binding. That it was not considered perfect by the insolvent himself was manifest by what he subsequently did, for it was found that leaving this deed in the protocol of the notary from 1860 up to May, 1863, the donor then began to consider whether it was not possible that there might be some deficiency in it, and with a view to remedy it, the deed of the 13th of May, 1863, was passed, setting forth the previous deed of donation, and making it a preferent claim upon his estate. That deed was duly registered. It is remarkable

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that in the month of August, 1863, the insolvent called a meeting of his creditors, and it could not fail to strike every one that in passing the bond in the May previous, he must have had in view the dark clouds which subsequently passed over him. The bond of 1863 being duly registered, was the completion of the inchoate deed of 1860, under which jointly the defendants set up their title. I can only say that I have grave doubts as to the validity of the deed of 1860 *per se*, and I consider its being completed by the deed of 1863 also extremely doubtful; but without deciding judicially upon these points, I may remark that a deed of donation *mortis causa* could only be paid after the estate of the donor had been wound up and sufficient funds were available for the purpose. These are the grounds upon which I entertain grave doubts whether the deeds of 1860 and 1863 could be considered as entitling the defendants to a judgment of the Court, either under the provisions of the Insolvent Law, or on general principles; but as the plaintiffs have a remedy still in their hands, I think that with regard to the two deeds the defendants are entitled to absolution from the instance. But independent of the deeds, there still remains for consideration the acts which the insolvent committed between March and June, 1863, when he attempted to set aside certain parts of the assets of his estates in favour of the donees, who were only to have received his gift after his death. The insolvent appears to have endorsed twenty-seven bonds and valuable securities, ceding and transferring them for the purpose contemplated by the deeds. This separate cession and transfer must be considered independent of, and as having no legal connection whatever with, the deeds; and the question for the Court to decide is, whether that cession was to be held valid and to have passed over certain securities, or whether the latter remained as a portion of the assets of the insolvent estate. The question has been thrown out rather loosely in the course of the argument, but was not much insisted upon, whether these securities were to be regarded as movables or immovables, and upon our attention being directed to the question, I feel myself bound to consider that they were movables, and that, such being the case, that they could only

pass by tradition or actual delivery, such act of delivery being an exchange from hand to hand of the actual property itself. The question is whether the securities now sued for had been passed away in this manner. A nice question might have arisen upon this point, if the insolvent had at any time after 1860 executed a public deed, setting forth that he ceded, transferred, and made over certain documents therein specified, for the particular purpose named; but in this case, for reasons best known to himself, the insolvent merely made a memorandum on certain documents, which he kept in his own possession, and refused to deliver them up until they were found by a Commission which was appointed to examine his papers. There was nothing to show that the donees were aware of what had been done, and the fact of the insolvent endorsing the deeds amounted to nothing more than to show his intention to pass over the property to the defendants, which by a previous instrument he had directed should be administered by his executors. Such intention did not transfer possession in the slightest degree. On these grounds I am clearly of opinion that in regard to these twenty-four securities, they are assets which the insolvent had no power to set aside, and that they must still be regarded as assets in his estate to which the plaintiffs are clearly entitled. The judgment of the Court should be that the Registrar should be ordered to cancel the endorsements on the bonds, and to hand the same over to the trustees of the insolvent estate.

WATERMEYER, J.:—The deeds now challenged are of a doubtful character, and I question whether a similar case can be found in any of the books. I am, indeed, doubtful whether the first deed can be called a donation, as it did not contain the most important provision of deeds of that nature. If the deed is a donation burdened with a *fidei commissum*, it certainly has not been accepted as such. Whether the deed might be considered as a donation *mortis causa*, or as a donation *inter vivos*, I am not perfectly clear, but if it was the former, and was only to take effect after the death of the donor, the question is whether it was anything more than the right of

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children to their legitimate portion, an irrevocable right, which, however, would not be paid until after all claims upon the estate had been cleared off. But the whole of this deed, as it is called, seems to me to be something inchoate, which never passed any property at all, and which was not intended to do so until shortly before an act of insolvency had been committed by the alleged donor. It has been rightly argued that at the date of the deed of 1860, the donor had no intimation of an insolvency, and taking that everything had been done by a man who was possessed of £1000, to give up that £1000 to another, yet, as nothing had been given and accepted, the transaction was incomplete. A person might say to another, "I give you a million sterling," and the other might say, "I accept a million sterling thankfully;" but except the million sterling was passed from one to the other it would amount to nothing. Unless the money which was supposed to have passed was kept distinct from the other money of the donor it was not given and taken. It is on these grounds that I doubt whether the deed was a donation, *mortis causa*, or *inter vivos*, or, indeed, whether it could be called a donation at all. If it was held that the deed is a donation burdened with a *fidei commissum*, such donation must be accepted by the person who was to receive it; but here the parties who accepted were those who had merely a life interest, and the real donees did not accept at all. The deed was said to be a donation by Brink in favour of his four daughters, in which the donor retained to himself the administration of the capital and the interest during his lifetime, and at his death the children did not get the money, but merely received the interest. If married, they received the whole of the interest, but if unmarried, only one half of it; but after their death some one else was to have the capital, no one having accepted the donation on their part. Where a donation *inter vivos* has been given and accepted, it is irrevocable, but if there was not such a full and complete acceptance the act is imperfect. Respecting the securities which had been endorsed over by the insolvent, I hold held that to make the transaction complete there must have been an actual delivery of the goods. In the

present case, the property was in Brink's possession, and nothing passed from him up to the date of the bond of 1863, and I agree with my learned brother that whatever might be the view which was taken of the donation of 1860, although the bond of 1863 seemed to refer to it, that bond could not be set aside by the present action. As to the cessions which appear to have been made by the insolvent for the purpose of carrying out the terms of the bond, I regard those cessions as amounting to nothing. The securities were found amongst the assets, and the cession must be regarded as a mere writing on a piece of paper. It amounts to no more than if the insolvent had marked the names of different persons upon pieces of furniture, with the intention that such furniture should be given to the persons whose names they bore. I quite agree that the endorsements upon the bonds must be cancelled by the Registrar.

1864.  
Dec. 1.  
—  
Trustees of  
Brink vs.  
Mechan and  
others.

Judgment was therefore given for the plaintiffs, the Registrar to cancel the endorsements upon the securities, and to hand them to the plaintiffs. The defendants to pay their own costs, and one half of the costs of the plaintiffs.

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GIE (Trustee) vs. WHEELS.

*Sale.—Uncertificated insolvent.*

*Creditors having authorized a trustee to sell landed property, the latter authorized the insolvent to purchase it: Held,—that the sale was valid, and the plaintiff (the trustee) was entitled to judgment for the purchase money.*

Action to recover the sum of £170, being the purchase money of certain land bought by the defendant out of his own estate through his agent Van Reenen. The plaintiff was the trustee of the estate of the defendant who at the

1864.  
Dec. 1.  
—  
Gie (Trustee)  
vs. Wheels.

1884.  
Dec. 1.  
Gle (Trustee)  
vs. Weeks.

time of the sale was an insolvent. The defences to the action were that at the time of the sale the defendant was an uncertificated insolvent incapable of making a legal purchase, and that the plaintiff, being trustee of the estate, had no right to sell the property to the defendant.

*The Attorney-General*, for the plaintiff, argued since it had been proved that the trustee had sold the property with the consent of the creditors, the sale was valid.

*Cole*, for the defendant, argued that the insolvent had no right to buy the property as an uncertificated insolvent; his accounts were not filed till nine months after the sale.

THE COURT held that the perusal of the resolution passed by the creditors had satisfied the considerable doubt which the Court had felt as to the position of the plaintiff as trustee, namely, that he was absolute master of the estate, which had been argued by the Attorney-General. It appeared that an insolvent, the accounts of whose estate had not been passed, could not acquire property, and the general principle was that the trustee was an agent acting under the direction of the creditors. According to the insolvent law even sales of movables were subject to the approval of the creditors, and the Court could not agree with the plaintiff's counsel when he argued that the trustee could give authority to the insolvent to purchase. In the present case, however, the resolution passed by the creditors authorizing the trustee to sell the landed property according to his discretion got rid of this difficulty. The trustee having this discretionary power authorized the insolvent to purchase, and that purchase had been satisfied by him. Judgment would therefore be given for the plaintiff.

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## BARRY AND OTHERS vs. ERASMUS.

*Provisional sentence.—Bond.—Agency.—Orange Free State.*

*Provisional sentence was granted for interest on a mortgage bond made and registered by defendant's agent in the Orange Free State, but execution was stayed for a time to enable defendant to plead a claim in reconvention.*

Application for a provisional sentence for £82, being one year's interest upon a bond passed in the Orange Free State by the agent of the defendant, where it had also been registered. The defence to the application was twofold, namely, that as the bond was passed and registered in the Free State it could not be enforced in the Cape Colony, and that there was no proof that it had been executed by the authority of the defendant. But in affidavits the defendant admitted that he had signed a power authorizing his agent to pass a bond for £820 in favour of defendants.

1864.  
Dec. 3.  
—  
Barry and  
others vs.  
Erasmus.

*Cole*, for the plaintiffs, argued that the bond itself was not being sued on, but it was merely used as an acknowledgment of a debt on which interest was due, and therefore that the question of a foreign judgment was immaterial.

The defendant's admission put an end to objection as to the agent's authority.

*The Attorney-General*, for the defendant, argued that it was in effect asking the Court to give judgment on a bond given in a foreign country.

*CLOETE, J.*:—The question raised in this case is one of some difficulty. If the bond in question had been signed by the defendant himself there could be no doubt that the Court would have considered it a liquid document, and would have given provisional sentence upon it. On the other hand, if, as in the present case, the bond was signed by an agent, it would have refused such sentence, because there would have been no authority before the Court to show by what right the agent had so signed. The defendant's

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Dec. 3.  
Barry and  
others vs.  
Erasmus.

admission had, however, removed this difficulty, and there could be no doubt that this document was legally entered into. A further objection had to be disposed of, viz., that this was a mortgage bond hypothecating certain property in the Free State over which the Court had no power. The effect, therefore, of a judgment was, that no property of the defendant except such as was within the jurisdiction of the Court could be touched to satisfy the judgment. Under these circumstances the Court would give provisional judgment, but execution would be suspended till February 1st to give the defendant an opportunity to put in a plea or claim reconvention in the principal case.

WATERMEYER, J., concurred.

*Inter 252, 258*

BURGERS vs. MURRAY.

*Dutch Reformed Church.—Moderator.—Defendant.—Ordinance No. 7, 1843.*

*In an action by a Minister of the Dutch Reformed Church against the Moderator of the Synod as the representative of that body: Held,—that the action was wrongly brought against him, and that the proper body to be sued was the Synodical Commission.*

1864.  
Dec. 3, 8.  
Burgers vs.  
Murray.

Action by the Reverend Mr. Burgers, the Minister of the Dutch Reformed Church at Hanover, against the Reverend Mr. Murray, the Moderator of the Synod of that body. The action was to set aside a sentence of suspension, which had been pronounced against the plaintiff by a Commission appointed by the Synod to inquire into certain complaints of unsound doctrine made against the plaintiff. The defendant raised the objection that he was not the representative of the Synod, and had no power to appear on behalf of that body.

The defendant, in person, argued that he was chosen simply

to preside over the meetings of the Synodical Commission. There were officials of this religious body of more authority than himself, as the Actuarius; he was in no sense the representative officer of the Synod.

1864.  
Dec. 3, 8.  
—  
J. Burgers vs.  
Murray.

*The Attorney-General*, for the plaintiff, argued that it would be impossible for the plaintiff to sue all the members of the Synod, and that defendant was sufficiently a representative for the purpose of an action at law.

*Cur. adv. vult.*

CLOETE, J., held that the action was wrongly brought, and that it was necessary that the members of the Synodical Commission should be made defendants. He commented upon the fact that by Ordinance No. 7 of 1843, the presbytery was the body which was charged with the duty of hearing charges against the doctrine or conduct of ministers; while in the present case a hybrid body, called the Synodical Commission, had been appointed for that purpose. The Synodical Commission would have to show from whence it derived its authority to sentence the plaintiff, whether from the Ordinance, or from the Synod of 1862. The present action was wrongly brought, but the defendant not having raised the objection which had influenced the Court, nothing would be said about costs. The plaintiff could either summon all the members of the Synodical Commission, or only those who voted in the majority which had sentenced him.

1864.  
Dec. 8.  
—

WATERMEYER, J., concurred in thinking that the action ought to have been brought against the Synodical Commission. He was not quite clear that cases of this kind might not be greatly simplified if they were brought against the "Dutch Reformed Church of South Africa," as the body was designated in the Ordinance, which treated of it as a corporate body, and process could be served upon the persons taking part in the proceeding if during the Sessions; and if the Synod was not in session, upon the Moderator and the Actuarius. In this manner he thought the Dutch Reformed Church would be brought properly before the Court. In the former case of Mr. Kotze, he considered



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Dec. 3, 9.  
Burgers vs.  
Murray.

that the Church was properly before the Court, as the Synod was in Session when the proceedings were commenced, and empowered the Moderator to defend the action. He did not think that the Moderator of the Dutch Reformed Church was liable to be called upon to answer for all the acts of the Church, as he had been called upon to do in the present case. It followed, therefore, that the right body to bring before the Court in the present case was the Synodical Commission to answer for its acts, and no difficulty could arise in adopting this course, as the number of the members of the Synodical Commission was not large. He was of opinion that as the defendant's exception had not been allowed, although the Court was of opinion he had not been rightly brought into Court, that no order should be made as to costs.

[Attorneys for the Plaintiff, FAIRBRIDGE & ARDERNE.]

REED (*Appellant*) vs. TURNER (*Respondent*).

*Resident Magistrate.—Municipal Rate.—Act No. 31, 1860,  
§ 64.*

*The Resident Magistrate has jurisdiction to entertain an action for the recovery of municipal rates, though the person charged does not live within his jurisdiction.*

1864.  
Dec. 15.  
Reed (*Appellant*)  
vs. Turner  
(*Respondent*).

Appeal from the Resident Magistrate of Port Elizabeth. The appellant was the defendant in the Court below, and the plaintiff was the collector of municipal rates for Port Elizabeth; the action was brought to recover £14 7s. 6d. for municipal rates, and the Resident Magistrate gave judgment for the plaintiff.

*Cole*, for the appellant, argued that the judgment was wrong, because that as the defendant resided in the division of Uitenhage, the magistrate had no jurisdiction. He relied on *Jessup vs. Currey*. Secondly, because the defendant was

only served on 22nd of the month with a summons returnable on 25th.

*The Attorney-General*, for the respondent, argued that by Act 31 of 1860, section 64, the Magistrate had jurisdiction over all actions for municipal rates, without regard to the place where a person lived.

1864.  
Dec. 18.

Reed (*Appellant*)  
vs. Turner  
(*Respondent*).

CLOETE, J., was of opinion that the appeal was not maintainable. As to the first point, he considered that it was necessary for the purposes of collecting the municipal rates in Port Elizabeth and like places that the Resident Magistrate should have the power of compelling persons who had property within the municipality to pay the rates due in respect of it. The object of the Act No. 31 of 1860, section 64, was to prevent the necessity of suing persons all over the Colony; it gave a special power to the Magistrates to entertain cases such as the present, and therefore this objection must be overruled. As to the second point, he did not think it was tenable.

WATERMEYER, J., concurred.

Appeal dismissed.

SPENGLER (Trustee) vs. EXECUTORS OF HIGGS.

*Will.—Children.*

*The word "children" when used in a will means children of the first degree only, and not grandchildren.*

Action to obtain the amendment of the plan of distribution of the estate of John Higgs, deceased.

The question turned on the meaning of the word "children." The facts were not in dispute.

1864.  
Dec. 15, 29.

Spengler  
(Trustee) vs.  
Executors of  
Higgs.

*The Attorney-General*, for the plaintiff, argued that by the

1864.  
Dec. 15, 29.

Spengler  
(Trustee) vs.  
Executors of  
Higgs.

word "children" it was intended to exclude "grand-children."

*Cole*, for the detendants, argued that by the Roman-Dutch law of the Colony "children" had a more extended meaning than it had in English law, and included grandchildren.

*Cur. adv. vult.*

1864.  
Dec. 29.

CLOETE, J.:—This is an action brought by Tobias Spengler, as sole trustee in the insolvent estate of James Higgs, against the Secretary of the Board of Executors, and George Higgs, as executor dative in the estate of John Higgs, deceased, and Esau Harrington, as tutor dative of the minor, Charlotte Butler, Harriet Caroline Higgs, married to Charles Hugh Attwell, John Higgs and Sarah Higgs, children of the late John Higgs, deceased, claiming that the distribution account framed by the first-mentioned defendants in the estate of the late John Higgs and his deceased wife Mary Higgs, may be amended so as to exclude the minor children of John Higgs, junior, and the minor child Charlotte Harriet Butler (these being grandchildren of the late John Higgs and Mary Ann Higgs), from any share in their estate, and that the assets of that estate should be distributed solely among the children of John Higgs and Mary Ann, who outlived their said parents. The admissions entered upon the records of the Court by both parties with a view of saving expense, has left no doubt as to the facts upon which this important question is to be decided. It is admitted by both parties that the deceased John Higgs, senior, and Mary Ann Higgs came to this Colony in the year 1821, having been previously married in England, their native country, from whence they arrived and settled in this Colony. These persons acquired considerable landed property about Wynberg; and in their marriage the following children were born: (1) John Higgs, (2) William Louis Higgs, (3) Charles Higgs, (4) George Higgs, (5) James Higgs, (6) Sarah Ann Higgs, (7) David Higgs, (8) Charlotte Elizabeth Higgs, (9) Joseph Higgs, (10) Harriet Martha Higgs. On the 16th of April, 1833, the testators, John Higgs, sen., and his wife Mary Ann, passed before the then

notary public, Joseph Sturgis, a mutual will, which appears to possess all the requisites of a properly executed notarial deed, and in which it may not be unimportant to observe that the notary public commenced the clauses of the will by inserting (what is not otherwise usual) that both the testators declared that they were born respectively in Berkshire and in Kent, and they were married at Dover in Kent, prior to coming out to this Colony. By this will, the testator, John Higgs, for himself, declared it to be his will: "The first appearer, the said John Higgs, to give, devise, and bequeath all his property of every description which he may possess at the time of his decease, movable or immovable, and wheresoever situate, and whether the same be in possession, reversion, remainder, or expectancy, nothing excepted, unto his said wife, to be by her held, and enjoyed during her natural life; and at the death of his said wife, the testator directs that the same shall go to and amongst his children, in equal shares and proportions, share and share alike, subject to the conditions after-mentioned, to wit: That an inventory and valuation of the said property shall be made by two competent disinterested persons, as soon as conveniently may be after his decease, and such part thereof sold as may be necessary to pay off and discharge the just debts and funeral expenses of him, the testator, or, as may be thought most advisable, by two executors jointly with his said wife, that his landed property be not sold if it can be avoided. And also subject to the maintenance and education of all such child or children as shall have been procreated in wedlock, during their minority. And the testator doth further direct that in the event of his said wife being desirous of entering into a second marriage, but not otherwise, she shall be obliged to give good and sufficient security, to the satisfaction of executors to this will, for the forthcoming of such portions, as shall be due to such child, or children, in equal proportions, according to the inventory and valuation aforesaid. And the testator doth further direct that after the death of his said wife, the said property, or so much thereof as shall then remain, shall again be inventoried, and continue in the hands of the executors in trust, to pay, and apply the rents, profits, and interests, and

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Dec. 15, 29.  
—  
Spangler  
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Higgs.

emoluments arising therefrom, to and amongst such child or children, or, being a minor, or minors, for their maintenance and education until such time as the youngest child, if more than one, then living shall have attained the age of twenty-one years, or be married by consent of guardians, whichever shall first happen, when the said property, movable or immovable, as aforesaid, shall be valued and appraised by two indifferent persons, and it shall be at the option of the eldest son (if any then living), or in case of no son being then alive, then the eldest daughter, to take over the said property at such valuation, upon paying or giving satisfactory security for the portion of his or her brothers and sisters, payable by three equal instalments, the first in one year, the second in two years, and the third in three years, from the date of such valuation; and in case he or she shall refuse so to take over the said property, or fail to give such security to the other children, then the testator directs that the said property shall be offered upon the same terms and conditions to the next in seniority; and in case of all refusing or being unable to give security, then the testator directs that the same shall be sold by public auction." And we may here add that after this declaration of the testator's will, in the event of his fore-decease, the testatrix, for herself, declares that in the event of her decease she gives and bequeaths all her estates and effects of every description and wheresoever situate, to her said husband, to be by him held and enjoyed in full and free property for ever, without any conditions whatsoever; and it may not be unimportant here to add, as to the facts of the cases bearing upon the question at issue, that their eldest son, John Higgs, died on the 4th of June, 1840 (and thus before the decease of either of the testators), leaving, however, three children: Harriet Caroline, now married to Charles Hugh Attwell, John Higgs, and Sarah Higgs, who are all parties to the present suit. The testator, John Higgs, sen., died on the 10th of June, 1845, when the provisions of the will came to take effect, and the surviving widow, Mary Ann Higgs, continued in her widowed state until the date of her death on the 12th of June, 1863. One of her children, Charlotte Elizabeth Higgs, who had married Edward Butler, died on the 20th December, 1849, leaving

one only daughter, Charlotte Harriet Butler, also represented by her guardian, Esau Harrington; and upon all these facts being admitted, the important question for the decision of this Court arises, whether these grandchildren—namely, the three children of John Higgs, who died in 1840, before the testator, and the child of Charlotte Elizabeth Higgs—are respectively entitled to any and what share in the estate of the late John Higgs, under his will. If this question had to be decided by applying the general principles of our Colonial laws to the present action, much of the difficulty presenting itself would be removed by the undoubted right which the grandchildren (at least the grandchild Charlotte Harriet Butler) would have had to claim a legitimate portion due to her out of the grand-paternal estate; but any claim arising merely from operation of law, is at once done away with by the fact that, the testators being natural-born British subjects, and having arrived here as married persons in the year 1821, they (as it appears to me from the studious insertion of their position and rights in the will), and particularly from the fact that the testatrix bequeathed the whole of her estate to her husband, without any mention of her children, must be held to have expressly reserved to themselves the power to dispose of the provisions of the Proclamation of the 12th of July, 1822, by which it is enacted that all residents in this Colony being British-born subjects of the United Kingdom of England and Ireland shall enjoy the same rights of devising their property, both real and personal, as they would be entitled to exercise under the laws and customs of England. By virtue of this Proclamation, the late John Higgs could legally dispose, *pro lubitu*, of any part of his estate, and we are restricted to examine how far the words of his will are to be construed according to the Colonial law. In the construction of those words, also, we are bound to hold that, if there should be any difference in their legal interpretation by applying the tests or authorities thereto from our Roman-Dutch laws, or from those of England, the latter should be the authorities to govern the construction of the will as in this case. Not only were the testators natural-born British subjects, but the will itself was drawn up by a notary public in the English language,

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Dec. 15, 20.  
Spengler  
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Higga.

with special reference to the rights which the testators were exercising to devise their property according to the laws and customs of England. This, then, being the rule which we are bound to apply to our judgments, it will hardly be necessary (as it strikes my mind) to go very minutely into the abstract question, whether under the Roman-Dutch law grandchildren are at once to be considered to be included in the general term of children. It will be sufficient, then, to state that by the Roman law the word *fili*, and *liberi*, have been used to designate what we would call "children," that to the word *liberi* has generally been given a more comprehensive application, which would be more fully rendered by the English word "issue." The *Lex* 220, Lib. 50, Tit. 16, *De verborum significatione*, has these words:— "*Liberorum appellatione Nepotes et Pronepotes cæterique qui ex his descendunt, hos enim omnes suorum appellatione Lex 12 Tabul. comprehendit; toties enim leges necessarium ducunt cognationem singulorum nominibus uti, veluti Filii Nepotes, Pronepotes cæterorumque qui ex his descendunt quotiens non omnibus qui postea sunt, præstitium voluerint, sed solis his succurrent, quos nominatim enumerent. At ubi non personis certis, non quibusdam gradibus putantur: sed omnibus, quo ex eodem genere orti sunt, liberorum appellatione comprehenduntur.*" From this authority it is clear that the word *liberi* was intended to designate all descendants in *in-finitum*, although we find in the *Lex* 201, *eodem tit.* some authority that in some cases in the word *filius*, a grandchild may also be held to be included; but this is evidently there intended to apply to a particular case, where, by the term *filius* also the feminine *filia* had been understood; and this solution has been given by Professor Voet, in Lib. 36, 1-22, and *Senatus Com. Trebellianum* to this very *Lex* 201 of the *Digest*. In commenting on this legal question without sufficiently distinguishing between the force of the Latin words *liberi* and *fili*, but, taking the former word in its most comprehensive sense, he translates it into the Dutch words "kinderen," i.e. children, and adopts with approbation the definition of Sande in his *Decisiones Frisiacæ*, and states that as a general rule, where the Dutch word "kinderen" has been used, the children in the first degree are only in-

tended to be included ; but he adds that sometimes even in the word *fili* grandchildren have been understood, and that in all these cases, without too narrowly weighing the word, the strength of the word *liberi*, any dispute as to its signification should be more a question as to the will of the testator than the legal interpretation of the word used. This principle seems clearly to have prevailed during the seventeenth century. From the *Dutch Consultations* we find, in vols. 2, 4, and 6, some able legal opinions, apparently opposed to each other ; those which are to be found in vols. 2 and 6, holding that under the term "kinderen" grandchildren are to be considered, while that given in the Consult. 300 of the 4th vol. upholds the principle that where the word "kinderen" has been used, and there be nothing to show that the testator in the use of these words "intended" to include any other branches, that the word should be taken as used in its ordinary precise and restricted sense. In these text-books, then, conflicting opinions will be found on the legal construction to be put on this term "kinderen" (children), but by referring to *Kersteman's Dictionary*, published in 1768, two notable decisions of the Supreme Court of Holland, the one in 1733, and the other in the year 1736, are referred to, in both of which the Court held that by the terms used of children, no grandchildren, either in a direct or collateral branch, are to be considered as included, and the author seems to consider that those decisions have finally set that question at rest. It is thus satisfactory to show that the principles of our law would appear to be in entire concordance with the principle laid down by the Privy Council in the case of *Martin vs. Lee* (a), for the Privy Council have laid down that the term "children," when used in the English sense, would not, in its ordinary legal acceptance, be held to include grandchildren. Having thus laid down that the same principle from our laws as from those of Great Britain would apply to the present claim, we have only to see which of the plaintiffs will be entitled to take, under the denomination of children, their share in the estate of the late John Higgs. The widow Mary Ann Higgs having never re-married, she

1864.  
Dec. 15, 29.  
—  
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(a) 14 Moore, P. C. 142.



1844.  
Dec. 15, 29.

Spengler  
(Trustee) vs.  
Executors of  
Higgs.

continued in the undisturbed enjoyment of the usufruct or *fidei* commissary inheritance of that property; but the claims of these children must be computed from (or rather their right to any inheritance) must be reckoned to date from the death of the testator John Higgs, who (it is admitted) died on the 10th of June, 1845. From that date the testator's will is to take effect, and at that date he had living the following children, viz.:—William Louis Higgs, Charles Higgs, George Higgs, James Higgs, Sarah Ann Higgs, David Higgs, Charlotte Elizabeth Higgs, Joseph Higgs, and Harriet Martha Higgs. These nine children were then the persons who by the will of the testator became at his death entitled each to a ninth share of his inheritance, and for whose interest the surviving widow, who has been bound to find security for their respective shares in the property if she had re-married. The eldest son, John Higgs, junior, had, however, pre-deceased the testator by dying in June, 1840, he therefore could not take under the law, and from the authorities above quoted; his children not having been referred to, or held to have been intended to have been referred to, by the wording of the will, they cannot be entitled to any portion of the estate, although by our Colonial laws, if these spouses had married within this Colony, and in community of property, these children would have been clearly entitled to a portion of that estate, while we further hold that Charlotte Harriet Butler, as the only child of Charlotte Elizabeth Higgs (who died in December, 1849), has succeeded to the portion which became due to her mother at the death of the testator in the year 1845. We must, therefore, apply the laws to the present case, in which we have shown that the testators clearly intended to devise their property according to the liberty afforded by the laws of England, and we therefore hold, and give judgment, that the distribution account in this estate must be amended, and the assets in that estate divided into nine equal parts, to which, to award to the following persons a ninth share of the net proceeds of the estate, viz., to William Louis Higgs one-ninth; Charles Higgs, one-ninth; George Higgs, one-ninth; James Higgs, one-ninth; Sarah Ann Higgs, one-ninth; David Higgs, one-ninth; Joseph Higgs, one-ninth; Harriet

Martha Higgs, one-ninth; and Charlotte Harriet Butler, as sole heiress of her deceased mother, Charlotte Elizabeth Higgs, one-ninth parts in the estate; and that the costs of this suit should be paid out of the estate of the late John Higgs.

1864.  
Dec. 15, 29.  
Spengler  
(Trustee) vs.  
Executors of  
Higgs.

WATERMEYER, J., concurred.

### TUCKER vs. AUTHING AND OTHERS.

*Municipal Election.—Voters.—Act No. 11, 1864.—Acting Chief Commissioner.*

*When the Legislature made no provision for a list of municipal voters, and the Civil Commissioner used the Parliamentary Voters List: Held,—that this did not invalidate the election. Held also,—that the acting and the regular civil commissioner being legally the same officer, the latter could not impugn the validity of the act of the former.*

Motion calling on the respondent, the Civil Commissioner of Cradock, to show cause why he should not be restrained from holding an election for members of the Divisional Council, on the ground that the applicants Tucker and others had been duly elected. The points raised in the case sufficiently appear from the judgment of the Court.

1864.  
Dec. 15, 17.  
Tucker vs.  
Authing and  
others.

*Cole* appeared for the applicants.

*The Attorney-General*, for the respondents.

*Cur. adv. vult.*

CLOETE, J.:—In this case an interdict has been applied for to restrain the Magistrate from calling a second meeting for the election of members of the Divisional Council, and to order him to publish the names of the members who had been elected at a poll held before the late Acting Civil Commissioner. The facts are not really in dispute. By an Act passed during the last session of Parliament, a constituency

1864.  
Dec. 17.  
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1864.  
Dec. 15, 17.  
—  
Tucker vs.  
Authing and  
others.

was created for the election of members of the Divisional Council differing from that which previously existed. It appeared that the late Acting Civil Commissioner not finding any machinery in the Act by which the list of members might be amended, took the list used for the Parliamentary elections, and allowed the persons therein to vote members of the Divisional Council. At the meeting held for the election of these members the applicants had a large majority of votes, and certain persons protested against their return on the ground that the persons whom the Act allowed to vote, but who were not also possessed of the £25 franchise, had been precluded from doing so. Mr. Authing in taking office, thinking that the provisions of the Act of 1864 had not been complied with, declined to have the election gazetted, and fixed the 17th inst. for another poll, and in the meantime set about having the list of voters amended. It appeared clear that the Legislature (in Act No. 11, 1864) intended that the voters for the Divisional Councils should be different from those for the Parliament, but as it did not provide any machinery by which the lists could be amended, the Acting Civil Commissioner was right in using the only list of voters in his possession. The Acting Civil Commissioner and Mr. Authing, the Civil Commissioner, must in law be regarded as one and the same person, and a poll having once been held, it was not in the power of the Civil Commissioner to refuse to gazette the recently returned members. The interdict must be granted, and the applicants gazetted as members.

**WATERMEYER, J.:**—Act No. 11 of 1864 was intended, amongst other things, to create a different constituency for the election of members of the Divisional Councils, but in the 2nd section, by which this constituency was created, no machinery was provided by which the new voters were to be placed on the list in addition to the old ones. Under the 5th section of the Act No. 5 of 1855, the voters were those who were entitled to vote for the election of members of Parliament. It has been urged and was plainly the opinion of the Civil Commissioner of Cradock, that inasmuch as the old voters elected members under the new Act such election was not legal. The second section is not very clear, and

it is not impossible to read it as if it were intended that until a fresh valuation for road purposes the present voters should continue to exercise the franchise. I do not think this is the reading of the clause, but it was still arguable that it was so. The state of things, then, came to be this: the previous Civil Commissioner considered that as no machinery had been provided by which the list of voters could be amended, he had no power to alter it in such a way as to give effect to the Act of 1864, and he accordingly held the election with the old list of voters. The functions of the Civil Commissioners in matters of this kind are purely ministerial, and in withholding the publication of the names of the successful candidates, the Civil Commissioner exceeded his powers. As far as the late election was concerned, the voting list must be taken to be the right list of voters, and until some person comes to complain that he had been debarred from voting by reason of the wrong list being used, the election can not be interfered with.

1864.  
Dec. 15, 17.  
—  
Tucker vs.  
Authing and  
others.

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MARAIIS vs. LEIBRANT AND OTHERS (Executors).

*Legitimate.—Filial share.—Interest.*

*A. and B., his wife, were married in community of property, and made an ordinary mutual will. Subsequently they added a codicil, whereby among other things the survivor was to remain in possession of the property till his or her death. Any child opposing the disposition was to receive only his or her pure legitimate portion at once. C., a son of A. and B., married D., and in 1850 B. died. In 1851 A. promised to any child who should not claim his portion at once to leave him a sum equal to the interest on his legitimate, and in 1852 made a new disposition of his share of the joint estate for this purpose. C. predeceased his father, and the latter afterwards revoked the provision*

*as to the interest on the legitimate. On A's death D. claimed from his executors a sum equal to the promised interest : Held,—that D. had no right to claim it.*

1864.  
Dec. 15, 29.  
—  
Marais vs.  
Leibrant and  
others  
(Executors).

Action brought by Alida Marais, widow and sole executrix of Nicholas Johannes Tromp, deceased, against the executors of Johannes Tromp, deceased, to enforce an undertaking made by the late Johannes Tromp, and to cause them to pay her a sum due under such agreement.

*The Attorney-General* appeared for the plaintiff.

*Cole* appeared for the defendants.

The facts and point involved are fully set out in the considered judgment of the Court.

*Our. adv. vult.*

1864.  
Dec. 29.  
—

WATERMEYER, J.:—The plaintiff, Alida Brink, now married out of community to David Pieter Marais, formerly the wife of Nicholas Johannes Tromp, claims from the executors of the late Johannes Tromp that a certain undertaking made by Johannes Tromp in favour of Nicholas should be enforced, and that the account framed by the executors in the estate of Johannes Tromp should be amended. The facts in proof and admitted are, that Johannes Tromp, and Maria Wilhelmina Smuts, his wife, were married in community of property in 1809. In that year they made the ordinary mutual will, instituting the survivor with the children of the marriage heirs. Nicholas was one of these children. Before the death of either of his parents, he was married in community to the plaintiff. In 1850, his mother died. Nicholas himself died in 1854, leaving a will in which the plaintiff was instituted sole heiress and executrix. In 1850 Johannes Tromp and his wife executed a codicil under the reservatory clause to the will of 1809, whereby the survivor was, in case he or she remained unmarried, to continue in possession of the joint estate until his or her death. The inheritance of one child was burdened with *fidei commissum*. The other children, among whom was Nicholas, were, in case of no re-marriage, to receive their inheritances on the survivor's death. Any

child opposing the dispositions of the will was to receive only the pure legitimate portion due to children from their parents, and the difference between the legitimate portion and what would otherwise devolve on them should devolve on their children, or their "lawful descendants by representation," who were substituted as heirs. Some of the children claimed their legitimate portions, and received them at the following dates: Hendrina Tromp, married to P. H. Ley, 22nd September, 1851; Jeanetta Tromp, married to A. Louw, 22nd of March, 1852; Maria Tromp, married to S. J. Hofmeyr, 15th January, 1856, with interest from September, 1851. After Mrs. Tromp's death, Nicholas and his wife resided with the testator, and it has been proved that during their residence there, the latter expressed his desire to remain in possession of the entire estate until his death, and said that those of his children who did not claim anything out of the estate until his death would not suffer in consequence; he would, if undisturbed in his possession of the estate, give those who left him undisturbed the interest on the legitimate portion that might be claimed during his lifetime. This is proved by the plaintiff and by P. W. Liebbrandt, who married one of the daughters, one of the executors, and a defendant. In accordance with what took place on this subject, the testator did, on the 19th November, 1852, making a new disposition of his share of the joint estate, bequeath as a legacy to those of his children who had not demanded their legitimate portion, among whom was Nicholas, "such amount of money equivalent to the interest at 5 per cent. on their respective legitimate portions not paid out by him." In 1854 Nicholas died childless, leaving the plaintiff, as before stated, sole heiress and executrix. On the 5th of July, 1855, the testator, by a codicil, annulled and revoked the provision as to the interest on the legitimate unclaimed out of the mother's estate by Nicholas, and the others in whose favour it had been made. It is claimed in the declaration that the undertaking made in 1851, and evidenced by the codicil of Nov. 1, 1852, should be enforced by payment to the plaintiff, as sole heiress of the deceased Nicholas, of the amount of this interest, which is calculated to be £928. Now, it is clear that the plaintiff

1864.  
Dec. 18, 39.  
Marais vs.  
Leibrant and  
others  
(Executors).

1884.  
Dec. 16, 29.

Marai vs.  
Leibrant and  
others  
(Executors).

is entitled to all that was vested in Nicholas at the time of his death in 1854. The mother died in 1850. He immediately became entitled either to his filial portion payable on his father's death, according to the terms of the codicil of 1850, or to his legitimate payable immediately, by the claiming of which he would lose his right to the filial. He did not claim the legitimate, and therefore the filial share of maternal inheritance vested in him from the date of his mother's death, though payable only on his father's decease. In this state of circumstances the father promised—what the codicil of November, 1852, was intended to fulfil—that he would at his death give a legacy to Nicholas out of his estate, equivalent to the interest of the legitimate which he might have taken on his mother's death. It is clear, Nicholas could never have had a right before his death, or before his father's death, to both filial and interest of legitimate from his mother's estate. If at any moment he desired it, he might have got the legitimate, as did Louw, and Ley, and afterwards, after the death of Nicholas, Hofmeyr, and under the circumstances with interest, as Hofmeyr did: but the interest on the legitimate could not come out of the mother's estate, together with the filial on the survivor's death. This would be against her will. If, therefore, there had never been a revocation of the codicil, which was plainly intended to fulfil the undertaking sued upon by bequeathing this interest as a legacy, the plaintiff would not be entitled to it. The person who alone could take the legacy, and through whom, if he had taken, the plaintiff might have acquired, died before the testator, who intended to give it. It is a lapsed legacy. It never was vested in the intended legatee, and thus cannot vest in the plaintiff, claiming through him. She would, if entitled to claim the intended legacy to her husband out of her father's estate, be entitled equally to claim the paternal inheritance which would have devolved on him, had he survived his father. Both the legacy and the inheritance depended on his surviving his father. She has his maternal inheritance, because he survived his mother, and otherwise would not have had it. These remarks dispose of the case, as far as the plaintiff is concerned. It is perhaps unnecessary to say what would



have been the consequence if Nicholas had survived his father, and no provision in the terms of the undertaking had been made. By not taking his legitimate, he forfeited no right. The non-leaving the interest by legacy did him no damage. This promise of the father seems to have been nothing more than a declaration of what he intended to do by will—what, in truth, he actually did by will—but what he was entitled, as he might in regard to other portions of his will, to change when so minded, provided no legal rights were infringed upon. Nicholas could have no action for the expected legacy of the interest of the legitimate, but an action, if any, for damages sustained by his foregoing rights in hope of this legacy held out to him, and such damages could not exist. The further claim of the plaintiff must also fail. On the death of Nicholas, the executors made up the account of his estate, which was a poor one. The filial share of maternal inheritance was not included in it, because, though in the estate, it would not be payable until the father's death. The father received his legitimate, to which, as Nicholas died childless, he was entitled on this small estate, with the only large asset excluded. Now that this large asset enters the estate of Nicholas, the legitimate due to the father, who survived him, calculated on this new asset, vested in the son at his death, though payable only at the father's, must be payable to the heirs of the father. The fact of the father having received the legitimate on the first account, does not take from him his right, never given up, to take his due on what was omitted from the account. As to the commission, it was admitted that the defendants should amend the account to the extent of allowing in favour of the plaintiff the sum of £95 overcharged by the testator under the law. We think the costs should be paid out of the estate.

CLOETE, J., concurred.

1864.  
Dec. 15, 29.  
Marais vs.  
Leibrant and  
others  
(Executors).



## VAN REENEN vs. PEARSON.

*Execution.—Sale.—Death of debtor.—Ordinance No. 104, 1833.*

*When an execution debtor died after the seizure of his goods under a judgment of a Resident Magistrate, and the Messenger subsequently sold the goods: Held, on appeal from the Resident Magistrate,—that the sale of the goods under such circumstances was legal.*

1864.  
Dec. 15, 29.  
—  
Van Reenen vs.  
Pearson.

Appeal from the decision of the Resident Magistrate of the Cape Division. The appellant, viz. the plaintiff, M. M. van Reenen, was the executor dative of J. A. van Reenen, and he sued the Messenger of the Court for £20, the value of certain goods, the property of the deceased, seized by the defendant during the lifetime of J. A. van Reenen under an execution arising out of a judgment in the Magistrate's Court against J. A. van Reenen. Van Reenen died before the sale. The Resident Magistrate gave judgment for the defendant.

*The Attorney-General*, for the appellant, argued that though by section 31 of Ordinance No. 104, 1833, provision was not specially made for a case of this nature, yet that it was contrary to the general meaning of that law to allow goods, although seized, to be sold after the debtor's death for the benefit of one creditor only. He also referred to the Insolvent Ordinance, No. 6, 1843, section 22.

*Cole*, for the respondent, argued that section 31 must be interpreted strictly, and that the Court should hesitate to prevent the completion of a legal right which was already inchoate.

*Cur. adv. vult.*

1864.  
Dec. 29.  
—

CLOETE, J.:—The Court has taken time to consider the present case, because it struck them, when it was being argued, that it was a novel one. Further inquiry has confirmed this view, and has shown that the case is quite unprecedented in the practice of this Court. In this action,

which has been brought in the Resident Magistrate's Court, judgment had been obtained against J. A. van Reenen, an execution followed, and certain goods belonging to the defendant were attached by the Messenger of the Court. Previous to the sale of the goods so attached, J. A. van Reenen died, and a question arose whether under these circumstances the sale could go on, or whether the judgment must be regarded as a dead letter and tied up, until after the expiration of the six months which are allowed executors to decide whether they should pay the claims against the estate, or surrender it. The Court now has no hesitation in saying that the judgment of the Court below was properly carried out under the circumstances. The provisions of the Ordinance No. 104 do not apply to the present case, nor do the terms of the Insolvent Ordinance. According to the provisions of the common law, when an executive officer had taken goods into his possession, under a levy, the debtor was allowed an interval of six days in which he could release upon the payment of the debt, but in the event of his not doing so, the sale took place in the ordinary way. If any other rule were established in a country where in the majority of cases the goods attached were live-stock—if such property had to be tied up for six months, it would occasion a heavy loss to the estate. There is nothing in the law to authorize the Court in saying that the goods which had been seized should not be sold. The officer of the Court, notwithstanding the death of J. A. van Reenen, was bound to realize the goods on behalf of the triumphant party. Under these circumstances the appeal must be dismissed.

1864.  
Dec. 15, 29.  
Van Reenen vs.  
Pearson.

WATERMEYER, J., concurred.

Appeal dismissed.

TRUSTEES OF THE SOMERSET EAST BANK (*Appellants*) vs.  
COOPER (*Respondent*).

*Bank.—Assignment.—Notice.*

*Trustees of a bank were present in their individual capacity as creditors of the defendant, at which an assignment of the estate was agreed on, the bank also figured in the schedule as a creditor: Having sued on their debt, Held, on appeal, —that they were bound as trustees by this assignment.*

1884.  
Dec. 29.  
—  
Trustees of the  
Somerest East  
Bank  
(*Appellants*) vs.  
Cooper  
(*Respondent*).

Appeal against a decision of Watermeyer, J., on Circuit, in favour of the defendant in an action brought by the plaintiffs to recover judgment on a promissory note for £348 endorsed by the defendant. The defendant pleaded in the Court below, that after endorsing the note, but before it became due, he executed an assignment of his estate, by which the plaintiffs were bound. From the evidence it appeared that the plaintiffs were present at the meeting of the defendant's creditors at which an assignment was agreed on, not as representatives of the bank, but in their personal capacity, and that the bank appeared in the schedules as a creditor for £80 on another account than that now sued on.

THE COURT held that Watermeyer, J., was right, and the appeal was therefore dismissed.

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MOORE vs. BOSMAN.

*Promissory Note.—Days of Grace.—Orange Free State Ordinance No. 4, 1858.*

*Provisional sentence was refused against the endorser of a note payable in the Orange Free State, and presented before the days of grace allowed by the law of that State had expired. But on the principal case being heard: Held,—that the presentment of the note was a proper one, and that the action would lie against the endorser.*

Motion for provisional sentence on a note for £150 made by one Allison in the Orange Free State, payable at the Standard Bank, Bloemfontein, and endorsed by the said Allison to the defendant. The note was payable on November 18th. It was presented for payment on November 23rd, five days after the note fell due.

1865.  
Feb. 11.  
—  
More vs.  
Boeman.

*Cole*, for the plaintiff, produced a certificate of a notary, stating that in the Orange Free State six days of grace were allowed for the presentation of a note if the residence of the holder was not within six hours' ride of the place of payment.

*The Attorney-General*, for the defendant, denied his liability. The liability of the endorser was conditional on a proper presentation of the note. In *Randle vs. Haupt* (a) it was laid down that there were no days of grace in the Colony, and therefore, by colonial law, the note was presented too late. On the other hand, it was presented before the sixth day after the nominal date of payment, and therefore, by the law of the Orange Free State as proved, was presented too soon.

THE COURT said that foreign law must be proved as a matter of fact, and as according to the law of the Orange Free State, as proved before them, the note had been presented before it was due, provisional sentence must be refused. Costs reserved subject to the plaintiff going into the principal case, otherwise with leave to defendant to apply again to the Court for them.

The principal action afterwards came on for hearing. After argument the Court reserved judgment.

*Cur. adv. vult.*

The judgment of the Court was delivered by Watermeyer, J.:—

1865.  
Sept. 14.  
—

This is an action brought by George Munro More in his capacity as manager of the Standard Bank of South Africa,

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(a) 1 Menzies, 9.

1865.  
Feb. 11.  
Sept. 14.  
More vs.  
Bosman.

against the defendant, as endorser of the following promissory note :

" Tempe, 18 July, 1864.

" £150.

" Four months after date I promise to pay Mr. Jan Daniel Bosman, or order, the sum of one hundred and fifty pounds sterling, together with the interest thereon, payable at the Standard Bank, Bloemfontein, for value received.

" J. ALLISON.

" Endorsed—Jan D. Bosman."

The defendant pleaded, specially, want of presentment at the Standard Bank, Bloemfontein, and want of due notice. The note in question was discounted on the 13th September, 1864, by the defendant, with the Standard Bank, Bloemfontein, where it was made payable, the Cape Town manager, the plaintiff, having specially endorsed it to the Bloemfontein manager, to be settled in account. It was in the hands of the Standard Bank, Bloemfontein, on the 18th November, the day when it became due, but was not paid by Allison, who resides at that place or near it. It continued in the possession of the Standard Bank, Bloemfontein, until the 23rd November, when it was handed to one Nicholas Bosdyk to be protested. The law of the Free State allows of protests by persons not being notaries, provided such persons shall within three days make oath of all their proceedings before a justice of the peace. The protest in the present instance so verified stated that Bosdyk, "at the request of Gilbert Farie, the manager of the Standard Bank of British South Africa (Limited), Bloemfontein branch, the holder of the promissory note, repaired to the office of the said Standard Bank" and presented the note to the said Farie for payment, "who replied, No funds; and there were no funds on the 18th for payment of this promissory note."

By the first post after this the dishonour was notified by the manager at Bloemfontein to the manager at Cape Town (the plaintiff), and the protest sent. These reached Cape Town on the 1st December. The plaintiff at once placed the communications he had received in the hands of Fairbridge and Arderne, the notaries of the bank, who on the same

day (1st December) gave notice to the defendant of the non-payment of the note "by you endorsed in blank, and whereof the said bank is the legal holder, and which not having been paid when due was duly protested for non-payment." There can be no doubt that we must judge the question in this case—whether there has been such diligence on the part of the holder as to entitle him to recover against the endorser, or there has been such negligence on the part of the holder as to prevent his recovering—by the law of the Free State, and not by the law of this Colony.

The Free State is both the place of the contract and the place of payment. The duties of the holder, wherever he may be, must be governed by the law of the place where the note is payable. The law of the Free State as to bills of exchange, promissory notes, &c., has been proved before us. It exists in an Ordinance of the Free State Legislature, No. 4, 1858, signed by the President and Secretary, a copy of which, duly authenticated by the present Government Secretary with the seal of his office, is now before the Court. The sixth section is: "Protests for non-payment of bills of exchange and other paper of commerce must take place within six days after the day of payment, when the person against whom the protest is made resides in or not more than six hours on horseback from the chief town of any district, and within fifteen days if he resides at a greater distance from such chief town. 7. Such protests may be made by a public notary, or by any impartial person, provided that the latter shall, within three days after he shall have made the protest, make declaration on oath of his proceedings." Has this law been obeyed? It is clear that if the place of payment had been in this Colony, and there had been so much delay, the plaintiff could not have recovered. There are no days of grace in this Colony. Presentment on the 18th and notarial notice of non-payment by the earliest following post would have been requisite. But the Free State Ordinance differs from the law of this Colony. It was contended for the defendant that either the Free State law fixed six days of grace, and then the note did not become due until the sixth day of grace, which would have been the 24th November, so that presentment

1865.  
Feb. 11.  
Sept. 14.  
—  
More vs.  
Bosman.

1865.  
Feb. 11.  
Sept. 14.  
Moie vs.  
Bozman.

and notice on the 23rd were premature, or the law fixed no days of grace, but, merely stating that six days or fifteen days, as the case might be, might be allowed to elapse before the protest should be made or notarial notice of the dishonour should be sent to the parties interested, it required presentment on the day the note became due, which presentment it was clear from the instrument of protest had not been made. We are not inclined to think that it was intended by the Ordinance that there should be six days of grace where the maker resided at Bloemfontein, which is a chief town of a district, as is the case in the present instance, or within six hours from such chief town, or fifteen days of grace in the case of a greater distance. But if there were—and the meaning of “protests for non-payment, &c., must take place within six days after the day of payment,” is that within these six days there must be presentment, noting, &c.; in fact all that is usually done by a notary—then, although the rule in England is that where there are days of grace, a presentment before the last day of grace is premature and a nullity, so that a protest following thereon would be a nullity likewise, the Dutch rule as to presentment within a certain number of days was not the same. And it might be fairly maintainable that while the Free State adopted the old Amsterdam rule of allowing presentment within six days, they might reasonably be considered to have adopted the old Amsterdam practice likewise, which was as laid down in the 46th of the “Zaken van Koophandel,” that “the holder of a bill of exchange who has not been paid on the fourth day of grace, is entitled by the law of exchange in vogue to protest as well on the fourth as on the fifth or sixth, on which it is usually done.” This presentment and protest would have been on the fifth day. But the true meaning seems to the Court to be, that although the bill is due on the day of payment, and there are not, in the strict sense, days of grace, presentment being made on the due date, there should be no notarial costs or quasi-notarial costs incurred at once, and it should be sufficient if the holder within the sixth day thereafter, though not immediately on the non-payment of the note, should give the necessary notices to the antecedent en-

dorsers to retain their liability. In this case, then, there was, in fact, presentment, though not notarial presentment, of this note, which was held by the bank where it had been made payable, and where on the day there were no funds. It is a rule laid down in all the books, that where a note is held by a bank "upon a discount thereof or for the purpose of collection for the owner, it will be sufficient to establish a due presentment and dishonour of the note against all the parties thereto, that no funds are there lodged or possessed by the maker within the usual hours of business for the payment thereof" (a). Such presentment there has been in this case; but the Free State Ordinance expressly says that "protest," i.e. any act requiring notarial expenses, need not take place on that day, and a notice of the presentment which existed in the fact of there being no funds with the holder at whose office the note was payable on the day it became due together with an additional presentment of the 23rd, was, on the last-mentioned day—within the required six days—sent to the present plaintiff (Mr. More), and by him without any delay to the defendant. It appears that the holder did all that was required by him by the law of the Free State on the note becoming due and not being paid, and, therefore, there must be judgment for the plaintiff with costs.

1865.  
Feb. 11.  
Sept. 14.  
—  
More vs.  
Rosman.

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STUTTAFORD vs. DEKKER.

*Water Mill.—Failure of Water.—Provisional Sentence.*

*Provisional sentence was granted for rent due for a water mill, though the supply of water had been insufficient for the full enjoyment by the tenant of the mill.*

*Semble, per Cloete, J.—If the tenant had applied to annul the contract or for damages, he would not have granted provisional sentence.*

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(a) Story on Promissory Notes, s. 243.



1865.  
Feb. 11.  
Stuttaford vs.  
Dekker.

Motion for a provisional sentence for £50, being two quarters' rent of the Annandale Mill, under an agreement between S. S. Stuttaford, the plaintiff, and N. Dekker, the defendant. The agreement stipulated that the mill was let for a year, from May, 1864, to May, 1865, at a rent of £25 per quarter, the tenant to keep in repair the mill and machinery, and to have all plaintiff's rights in regard to the supply of water. The first quarter's rent was paid; the two subsequent quarters' rent was the subject of the present action. The defendant, as against the issue of provisional sentence, relied on the facts, which he substantiated by affidavit, that the supply of water to the mill had been insufficient; that on complaining of this fact to the plaintiff the latter visited the mill, and said that he thought the municipality were improperly using the water; that from the month of August to the date of the affidavit, defendant had been unable to work the mill except during times of rain; and, while tenant of the mill, had only ground 2000 muids of grain. He stated that his trade had in consequence been ruined, and having lost so largely he was unable to pay the rent; and that the plaintiff, though he was aware of the insufficient supply of water, took no measures to obtain a proper supply.

*The Attorney-General*, for the plaintiff, distinguished the present case from that of *Thomson vs. Currey*, in which provisional sentence was refused for the rent of a vineyard when it was shown that the defendant was unable to pay in consequence of a great and unanticipated misfortune to the vineyard, the crop being destroyed by vine disease. There was no contract by plaintiff to supply a continuous flow of water. There must be an express stipulation in the contract to release defendant from payment of his rent under such circumstances.

*Cole*, for the defendant, argued that in a lease of a water mill there was an implied agreement by the lessor that there should be water to turn it. If the plaintiff knew, as he did, that water was being abstracted he should have taken means to have such abstraction stopped. If he did not do so defendant had less than he stipulated for, namely

the whole amount of water to which the plaintiff was entitled. He referred to *Grotius* (bk. 3. c. 19. s. 12).

BELL, J., said:—In this case there has not been an eviction but a partial enjoyment, and therefore a partial failure of the use of the mill. Therefore, provisional sentence must issue.

CLOETE, J., said he agreed, and he based his decision on the fact that defendant had taken no step either to annul the contract or to obtain damages for its non-fulfilment.

1865.  
Feb. 11.  
Stuttaford vs.  
Dekker.

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WILSON vs. TAYLOR.

*Civil Imprisonment.—Resident Magistrate.*

*As a resident magistrate cannot grant a decree of civil imprisonment out of his jurisdiction, application must be made to the Supreme Court.*

Application for a provisional decree of civil imprisonment.

Judgment for £20 had been obtained against Taylor, the defendant, in the magistrate's court at Cape Town. A writ of execution was issued, and there was a return of *nulla bona*. A decree of civil imprisonment was then obtained in the magistrate's court; before it could be executed, the defendant removed to Stellenbosch, out of the jurisdiction of the resident magistrate of the Cape Town division. There was no statutory power to enable a magistrate to back a decree of civil imprisonment against a person removed into his district to avoid being taken under it.

1865.  
Feb. 11.  
Wilson vs.  
Taylor.

*The Attorney-General*, for the motion.

THE COURT granted the motion, intimating that they would have given a final instead of a provisional decree if they had been asked for it.

## HARE vs. WHITE.

*Slander.—Right of Action.*

*The defendant, an officer in the Engineers, said to the plaintiff, also an officer, on the occasion of a garrison ball, "If you bring those two prostitutes into the room you are no gentleman," alluding to two persons with the plaintiff: Held,—on appeal, that these words were not actionable, since they were not used animus injuriandi, and that to say of a person that he was not a gentleman did not thereby impute to him misconduct which would make him an object of contempt or ridicule.*

1866.  
Feb. 18.

Hare vs. White.

Appeal from a judgment of Bell, J., on Circuit, at Graham's Town, in an action of slander brought by Major Hare, of the Cape Mounted Rifles, against Lieut.-Col. White, of the Royal Engineers. The alleged slander was as follows:—"If you bring those two prostitutes (meaning thereby two ladies, with Major Hare) into the room you are no gentleman." These words were used at a ball, given by the officers of the garrison, at King William's Town. At the trial on Circuit, counsel for the defendant took an exception to the declaration on the ground that, admitting the words to have been used, they were not libellous.

BELL, J., allowed the objection.

The plaintiff appealed.

*Cole*, for the appellant, argued that the words in question were libellous, and therefore an action would lie in respect of them. The Court must be guided by Roman-Dutch law, and not by English law, in deciding this case. He referred to *Grotius* (bk. 3. c. 86. s. 1), *Voet* (47. 10. 8) in support of his contention that such words were actionable by Roman-Dutch law. *Van der Linden* defined slander as the damaging

or injuring of a person's honour, either by word of mouth or by writing. He also relied on *Bailey vs. Abercrombie* (a).

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The Attorney-General, for the defendant, argued that the words were not actionable. The Roman-Dutch law did regard the injury to the individual as the cause of the action, but regarded the action as one for redress of honour. The present actions of slander in the Colonial courts were really based on the principles of English law, and therefore the law, as applied in England, must govern this case. The cases of *Mackay vs. Philip*, (b) and *Hill vs. Wallace*, (c) were referred to.

*Cole*, in reply.

CLOETE, J., said he entirely concurred in the view of the learned counsel for the plaintiff, that there was a wide discrepancy between the law of England and the Roman-Dutch law with regard to slander; but they had only to examine the written authorities and the host of judicial decisions given in this Court to ascertain what had been the view which the Court had uniformly taken in such cases. He had been counsel in three leading cases, and had obtained the *dicta* of all the Judges. Sir John Wylde and Justices Menzies and Burton laid down the simple propositions that anything done, *animo injuriandi*, for the purpose of hurting a person in his profession, character, or conduct, or in his good name and fame in the community; that to charge him with an offence that would subject him to punishment, or with having any loathsome disease, or to use any expressions that would make him an object of contempt or ridicule with his neighbours; that these things were actionable and none other. The reason why the form of action for an *amende* honourable and profitable came to be discontinued was that the Judges often found that the sentence of the Court for an *amende honorable* had to be enforced by civil imprisonment, and they threw out a hint that the Court was not favourable to such processes. In the case of *Bailey vs. Abercrombie* (a), the words used were of

(a) 3 Menzies, 33.

(b) Menzies' Rep. 1, 455.

(c) Menzies' Rep. 347.

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a very different character from those alleged in this case, and distinctly reflected upon the plaintiff in his professional character. In this case, Colonel White was stated to have observed of Major Hare, in connection with two young ladies, whose conduct might, perhaps, have occasioned remark or observation amongst the wives and families of the senior officers, "You are no gentleman if you bring them into the room." He was of opinion those words were not used *animo injuriandi*. They must be supposed to have been addressed by a superior in rank to a junior officer by way of caution or advice. Colonel White was entitled to have that construction put upon his words. Did they charge Major Hare with any crime or offence, or with any act that would render him unworthy of society, or make him an object of contempt or ridicule? He had not yet been able to find a proper definition of the word "gentleman," and in a case of this kind they were bound to give to the word the construction ordinarily accepted. It was a negative proposition that if Major Hare did something or other he would not be considered a gentleman. He (the learned Judge) thought it was a mere matter of opinion or advice, and had yet to learn that Colonel White had any intention of insulting Major Hare. Under the circumstances, there could not be the least doubt that the judgment must be confirmed. He had abstained carefully from making any remarks upon the question of jurisdiction. He should be exceedingly loath to express an opinion upon the very important question when merely introduced incidentally—dragged in, as it were, by the ingenuity of counsel. So grave a question should have been deliberately pleaded, and brought forward on the record.

WATERMEYER, J., concurred that the judgment of the Circuit Court should be confirmed. This was an action for defamation brought in the Circuit Court of Albany. The question before that Court, and before this Court now, was whether the words "You are not a gentleman, if you bring those two prostitutes into the room;" "You are bringing those women into the room to insult our wives and families;" and "I place you under arrest for striking Mr. Crozier,"

were actionable. The words referring to the striking of Mr. Crozier had, in effect, been struck out of the declaration by the counsel for the appellant, so that the meaning of the other words only remained to be considered. He would at once say that, with regard to the other questions which had been raised to-day—first, as to the right of the respondent to raise the question of jurisdiction in the Circuit Court and likewise here, and next, as to whether there really was jurisdiction in the Circuit Court of Albany—it was not necessary to say anything, inasmuch as upon the main question in the case the Court were of the same opinion. There could be no doubt that by the law of this colony the words, as applied to the ladies spoken of, were actionable. There could be no doubt that if these words were spoken—and they must be taken to have been spoken for the purposes of this argument—the persons called two prostitutes had a right of action. They were defamed plainly and clearly. It was quite true, as had been stated in the course of the argument, that by the law of England persons of whom this was said—the most modest and chaste virgins called prostitutes, as matrons of the highest character called by the same name, in however public a way—would have no right of action. Here, however, the law was different, and such an action would clearly lie; but that was not the question in the case. An imputation was distinctly cast upon the character of the two young women, but it did not follow that because that would be actionable this would be: “You are no gentleman if you bring them into the room.” These words might not be used *animo injuriandi* as regarded the plaintiff, but they could not be used otherwise as regarded the young women. It had not been argued that merely telling a man, “You are insulting our wives and families” would justify an action, and that was all that was said as regarded the plaintiff; the imputation was on the character of the young women. The law of this colony was very severe on defamation. One of the necessary elements of that was that the words should apply directly to the person to whom they were said to be used *animo injuriandi*. And then came the question whether, under all the circumstances, the expression “You are no gentleman” at once

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gave a right of action. There was nothing, as far as he had been able to see in the books, to justify him in coming to that conclusion. The case of *Bailey vs. Abercrombie and Chiappini* (a) did not warrant that conclusion. There was a direct allegation of misconduct professionally. He was not prepared to say whether the decision in that case did not go further than he should be disposed to go; but it did not necessarily follow that the words used here were directly actionable. He could not help regretting that in some way, the reason of which had been partially explained by Mr. Justice Cloete, the wholesome law of slander and libel which formerly prevailed here had been changed, and they now had something far less satisfactory in its place. There might be very good reason for the conclusion that an action for the *amende* honourable and profitable was a kind of thing that the Court would rather not have to enforce by civil imprisonment, but that was no reason why the *amende* profitable should not still yet be claimed. There was, as it seemed to him, a far greater similarity between the English action and our own, as now brought, than was generally supposed, and he was not prepared to say that the Court would not be almost bound to certain English rules as regarded temporal damage in this kind of action. His reason for saying so was that the action for the *amende* profitable had been dropped, and instead of that was now taken what was called the English action for libel, which would merely lie in cases where temporal damage had been suffered. He, therefore, considered that it would be well that declarations of this kind should be carefully examined, in order that the right principles might be acted upon by the Court in deciding them. He thought the departure from the old practice was not one that should be pressed any more than was absolutely necessary.

THE ACTING CHIEF JUSTICE concurred.

Appeal dismissed with costs.

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(a) 3 Menzies, 33.

MACDONALD AND CO. *vs.* GORDON AND CO.*Arbitration.—Presence of Parties.*

*It is improper conduct on the part of an arbitrator to ask a witness a question in the presence of one party only, and even though no actual injustice has been thereby done, it will invalidate the award.*

Motion that the award of arbitrators in this case should be made a rule of Court. The motion having been made,

*The Attorney-General*, for the defendant, opposed the motion on the ground that evidence was taken by the arbitrators in the absence of the defendant. The arbitrators, after the evidence on both sides had been finally closed, called in a certain witness, and asked him "where the detailed account of a certain item was to be found," and also whether certain mealies were included in a "stock list handed in." In reply to the first question, the witness referred the arbitrators to a list already in their possession; in reply to the second, he stated that he did not know. In taking this course the arbitrators had acted improperly, and had violated a fundamental legal principle by examining a witness in the presence of one party only, and without giving notice of their intention to do so.

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*Cole*, for the plaintiff, argued that the questions were of a purely formal nature, and that no injustice had been done to the defendant.

*Cur. adv. vult.*

THE CHIEF JUSTICE, after stating the facts of the case, said that without inquiring into the effect of what passed between the arbitrators and the witness the Court felt bound to lay down the general rule, that if an arbitrator desired to obtain any information at all from either party, or from a

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witness, he must summon both parties before him. He must give each party an opportunity of hearing the evidence and of making any observations on it if necessary. If this was not done the award would be invalid. The award in this case could not be made a rule of Court, and must be set aside.

CLOETE and WATERMEYER, J.J., concurred.

*vid p. 258*  
BURGERS vs. MURRAY AND OTHERS.

*Dutch Reformed Church. — Synodical Commission. — Corporation.*

*In an action against the members of the Synodical Commission of the Dutch Reformed Church: Held,—on exceptions by the defendants, that the individual members of the Commission were properly summoned.*

*Whether the Commission was a corporation, quære.*

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Exception to a declaration. The action was brought by T. F. Burgers against the Synodical Commission of the Dutch Reformed Church, and the defendants were proceeded against individually as members of the Commission at the time of the matters complained of by the action.

The defendants excepted to the declaration on the ground that the acts complained of having been done by the Commission in its corporate capacity, the Commission, and not the individual members, should have been summoned in the action.

*The Attorney-General and Buchanan appeared for the plaintiff.*

*Cole, for Van der Lingen, Heyns and Gil.*

*Barry, for Robertson and Albertyn.*

*Murray*, in person.

The other defendants did not appear.

*Cole* argued that this Commission was in itself a corporate body. On this point he relied on *Stephens' Commentaries*, 5th Ed. vol. iii. bk. 4, c. 1; Digest (Bk. 3, pt. 4, § 1), and *Voet*. The Commission was a *universitas*, and therefore the summoning of individual members was not a summoning of the corporate body. Great injustice would be done to the members if they were dragged individually into litigation, and as the body was constantly changing, great inconvenience might be caused by a judgment against individual members.

*Barry* and *Murray* argued on the same side.

*The Attorney-General*, for the plaintiff, argued that the Court had by a previous decision, see *Burgers vs. Murray*, ante p. 218, obliged the plaintiff to bring his action in this form. Secondly, the Synodical Commission was not a corporation; and thirdly, even if a corporation, yet not having appointed a Syndicus, it was properly summoned through its individual members. He referred to Digest 47, 22, 3; *Mathias* 45, ss. 1 & 5. The Ordinance, No. 71813, made the Dutch Reformed Church a voluntary association but not a corporation.

*Cole*, in reply.

THE CHIEF JUSTICE said that this was a case in which the declaration set forth that the defendants had been summoned in their capacity as the members constituting the Synodical Commission of the Dutch Reformed Church. There was no allegation in the declaration that all the *Primarii* had been summoned, but no objection was taken on the ground that any of them had not been summoned. Therefore he understood the plaintiff to have summoned all the *Primarii* present at the meeting, one who was not present, and all the *Secundi* who were present. Then by order of the Court, under which the action was brought, it was directed that the declaration should be amended, "service to be made on the members who constituted the Synodical Commission of July, 1864." He rather thought the date a mistake of the registrar; the order should have read, "service to be made

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on the members who constituted the Synodical Commission at the date of July, 1864." It was intended to apply to all who constituted the Commission at that period, and so it had been understood. If there were any foundation for the objection that the Synodical Commission had not been summoned, it would have been a good objection; but, in his opinion, the Synodical Commission had been summoned. The whole intention of the declaration was to bring before the Court the persons constituting the Commission. He was of opinion that the order of the Court had been fully complied with. The plaintiff's counsel had argued that if it had not been complied with, the proper course would have been for the defendants to apply to the Court. He rather thought that was not so. In so far the answer of the plaintiff went too far. But the objection taken, in his opinion, fell to the ground entirely, because the Synodical Commission was really brought before the Court. But then it was said the Commission could not be summoned by its members; that it could be summoned by a Syndicus, but could not be summoned by its members. One of the defendants had even gone so far as to contend that it was the duty of the Legislature to appoint a Syndicus. That was a strange perversion of the history and intention of the introduction of a Syndicus. The complaint against all large companies and associations was that a plaintiff against them must summon all the partners. It was a great grievance to plaintiffs, and also a source of trouble and expense to the defendants; and, therefore, for the convenience of both, syndics were appointed to represent them. It never was intended to be implied that if the corporation were summoned by all its members, it should say it had not been properly summoned, because it had not been summoned by its Syndic. The question whether associations such as the Dutch Reformed Church were corporations, he did not think it necessary to give an opinion upon, as the case did not turn upon it. It seemed to him that the objection must entirely fail, and was a most unreasonable one. If the defendants, who complained that, as summoned, they had no authority to represent the Commission, had desired to do so, they could have found means to do so long before now. But they

had chosen to stand upon what they believed to be their legal rights, and to stand by the objection, appearing by three different persons—a course which added greatly to the inconvenience and expense. In his opinion the exception ought to be overruled.

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CLOETE, J., concurred. The exception had been entirely mistaken. Looking critically at the points of the case which had been brought before them, it appeared to him that the declaration had been drawn with extreme care. It took notice of action against the eleven persons who, at the time, constituted the so-called Synodical Commission of the Dutch Reformed Church. The exception assumed an extraordinary position; and he was of opinion it could not be supported, as being in accordance with the rules and practice of the Court. The Court had more than once, when parties representing themselves to constitute a corporate body had not brought forward their authority to claim that title, rejected their summons, it being the very essence of a summons that there must be a party before the Court responsible for the summons, and for the proceedings and the sentence thereon founded. If the defendants had taken out a summons as a corporate body, the Court would, in his opinion, have been bound to reject it. He was clearly of opinion that up to this point the proceedings had been carried out in strict conformity with the order of the Court. He was happy to find that although there were eleven members of the Commission, those who had appeared had united substantially in the same line of argument, although there had been three sets of objections filed, and three different persons had appeared to support them. He was further of opinion that the objections ought to be overruled, because to allow them would amount to the defendants taking advantage of their own negligence, laches, or wrong. The standard authorities clearly laid it down that in order to carry effectually through all the matters connected with a *Universitas*, it was usual to appoint a Syndicus. Therefore, upon the first and third of the grounds taken by the Attorney-General (he did not wish to express any opinion

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upon the second), he was clearly of opinion that the objection should be overruled.

WATERMEYER, J., quite concurred that the objection must be overruled. It had been misconceived entirely. It set out by stating that the defendants severally came into Court, and before pleading to the declaration excepted thereto. This was a misconception. These gentlemen were not summoned; they were summoned in their capacity as members of the Synodical Commission, and as such they had never pleaded. They misconceived the declaration; having done that, they stated erroneously how they had been summoned, and then, upon their wrong foundation, they built the exception. In fact, the Synodical Commission had been summoned, and, in his opinion, so far as the statements in the declaration went, in the only way in which the Synodical Commission could be summoned—viz., by summoning each member in his capacity as a member. It was alleged that the Synodical Commission was a corporate body, and ought to have been summoned by its corporate name. He did not wish to enter upon the discussion whether it was a corporate body or not. At the same time, he thought it right to say that he did not assent to the propositions of the Attorney-General, but inclined rather to much of what had been said by Mr. Cole; and he would rather in these matters adhere strictly to our own terms, and call a *Universitas* a *Universitas*, and not a corporation; for *Universitates* might exist which were not corporations. There was this grave distinction between the English corporation and the *Universitas*, that, although in order to possess the full rights of a *Universitas*, at certain periods of history, the approbation of the *princeps* was necessary, yet the *Universitas* itself might be constituted without the authority of the *princeps*; the approbation came afterwards. In Holland, at all events, *Universitates* constantly existed not having the approbation of the *princeps*, not having the full right of *Universitates*, but merely tolerated: and although they had not then the right to hold property, he should doubt whether they would not be accorded the right now, as well as perpetual succession. And although, according to the English

term, a voluntary association having the power of regulating its own affairs, and the perpetual succession, might not be considered a corporation, he should require very strong arguments to prove that it was not a *Universitas*. But corporation or no corporation, *Universitas* or no *Universitas*, what was to be brought into Court was this Synodical Commission. The English rule was that a *Universitas* should be summoned by its corporate name; our rule was that a *Universitas* should appear by its Syndicus, which with the Romans was the mandate of the *Universitas* itself. Nobody claiming to be a *Universitas* could say: "Because we have no Syndicus you cannot summon us," which was, in fact, what was said now. They could not be summoned by a corporate name if they had no legal enactment; and then, even, the Syndicus would be simply a person holding the mandate of the body to act. It was quite clear that the body, through its Syndicus, or the members themselves, must be brought into Court: and that was what had been done in this case; therefore, he conceived that the defendants had nothing whatever to complain of. They were there only as a Synodical Commission, and as nothing else; they were not there individually, as they had erroneously supposed themselves to be. They had, in fact, everything which, by their exceptions, they claimed that they ought to have.

The second and third exceptions were then argued at some length. Both were purely technical, and were overruled by the Court.

Exceptions overruled, with costs.

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Burgers vs.  
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*In re W. CLYDESDALE.**Curatores bonis.—Discharge.—Accounts.*

*Persons who have been appointed curatores bonis to the goods of a person certified to be of unsound mind will not be discharged till they have filed accounts.*

1885.  
April 13.  
*In re W.  
Clydesdale.*

Motion to discharge the order of the Court whereby two persons, Eustace and Livingston, had been appointed as *curatores bonis* of W. Clydesdale. The application was made on behalf of Clydesdale, and was supported by an affidavit of his medical attendant to the effect that the applicant was now sufficiently recovered to manage his affairs.

*The Attorney-General* for the motion. He remarked, in answer to an observation of the Court, that the *curatores bonis* had not done any act in their office.

THE COURT said that the persons appointed as *curatores bonis* could only be discharged on sending in their accounts. Therefore the Court could not make the order which they were asked to do until the *curatores bonis* had filed their accounts, when the previous order should be discharged.

BURGERS *vs.* MURRAY AND OTHERS.*Dutch Reformed Church.—Suspension of Minister.—Right of Action.—Ordinance No. 7, 1843.*

*A minister of the Dutch Reformed Church, having been suspended by a Synodical Commission, brought an action against the members of that body. The defendants filed an exception to the declaration on the ground that the Court had no jurisdiction in respect of an act done under the spiritual authority of the Church, to which the plaintiff had, by his membership of the Church, submitted himself: Held,—That the Court had jurisdiction, and that the action would lie.*

Argument on exceptions to a declaration. The action was brought to set aside a sentence of suspension which had been pronounced against the plaintiff by a Synodical Commission of the Dutch Reformed Church, of which the plaintiff was a minister. The case had already been twice before the Court on important points of law (*ante*, pp. 218, 252.)

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May 28, 30.  
—  
Burgers vs.  
Murray and  
others.

*The Attorney-General and Buchanan for the plaintiff.*

Rev. A. Murray in person.

The other defendant did not appear.

The points raised by the exceptions, and the arguments addressed to the Court, are fully noticed in the following judgment.

BELL, J., said the case was one which arose out of some proceedings in the Synodical Commission of the Dutch Reformed Church against the Rev. Mr. Burgers, a minister, which resulted in his suspension. Against the sentence of that Commission the Rev. Mr. Burgers had brought his action in that Court, for the purpose of having that sentence set aside; and the grounds upon which he prayed that this might be done were set forth in the declaration: "1. Because the said plaintiff says that the use by him of the words upon which the said judgment, decree, or sentence professes to be based, is not proved by the evidence taken by the special commission aforesaid, and by it reported to the Synodical Commission. 2. Because even if the use of the said words by the said plaintiff had been proved, they could not sustain the charges upon which the said plaintiff has been found guilty by the said Synodical Commission; and because, moreover, if the said words would contravene one or more of the articles of the *Confessio Belgica* (which the said plaintiff submits that they would not), the said confession is not one of the standards established for the Dutch Reformed Church by the Ordinance aforesaid, No. 7, 1843. 3. Because, according to the laws and regulations of the Dutch Reformed Church as altered and amended in the year 1847, the Presbytery of Graaff-Reinet was the only court competent



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to try the said plaintiff in the first instance for or upon any charge against his doctrine; and because, therefore, the proceedings in his case, as hereinbefore set forth, were wholly irregular and illegal. 4. Because, irrespective of the incompetency of the Synodical Commission as a Church Court, the complaint by the elder of Colesberg against the doctrine of the said plaintiff was defective and informal, and not in conformity with the Church laws regarding such complaints, and because the proceedings consequent upon or connected with the said complaint were also informal and illegal, no sufficient notice, as required by the Church laws, having been given to the said plaintiff, before the meeting of the Synod in the year 1862, and no copy of the charge having been furnished to him until applied for by himself. 5. Because the special commission fell into error in taking evidence regarding certain words alleged to have been used by the said plaintiff on Christmas Day, 1861; and because the Synodical Commission also fell into error in taking those supposed words into consideration, seeing that no such words were contained in the charge against the said plaintiff; and because the Synodical Commission has found the said plaintiff guilty of the repeated denial of what, in the opinion of the said last-mentioned commission, has been most clearly proved to be true—a crime not charged in the complaint of the elder of Colesberg—and has in part grounded the sentence passed upon the said plaintiff on such assumed guilt. 6. Because during the session of the Synod in 1862, the said Synod was illegally constituted by reason of the presence therein, as members, of several extra-colonial ministers and elders, who took part in discussions connected with the case of the said plaintiff, acted upon committees appointed in reference to his case, and both in committee and in Synod voted when resolutions adverse to the said plaintiff were carried, and resolutions in his favour were rejected.” And then there was also a statement in the declaration respecting the component members of the Synodical Commission, to which it was not then necessary further to allude. To that action the Synodical Commission had placed on record the following exceptions: “Firstly, that the Dutch Reformed Church, of which the

defendants are the Synodical Commission; is a Christian Church, having certain articles of faith and rules of discipline specially appertaining to it, and having within itself inherently full spiritual authority over all its members, of whom the plaintiff was, and is, one, and as such has bound himself voluntarily to submit to the said spiritual authority as the same is exercised through the various spiritual courts of the said Church, and that such spiritual authority is, at the same time, as the defendants humbly submit, beyond the control, cognizance, or supervision of this honourable Court; and the defendants say they have hereto annexed a document marked A, in which they have set forth in full their reasons for claiming such spiritual authority for their Church, uncontrolled by any civil court whatever, and they pray that this honourable Court will refer thereto. Secondly, that by the 9th section of the Ordinance No. 7, of 1843, commonly called the Ordinance of the Dutch Reformed Church in South Africa, after enacting that persons giving testimony before any duly constituted judicatory of the said Church, shall not be subjected to action in the civil courts, it is further enacted as follows; that is to say: 'Nor shall any action, suit or proceeding at law be instituted for the purpose of preventing any such judicatory from pronouncing, in the case of any scandal or offence which shall be brought before it, and proved to its satisfaction, such spiritual censure as may in that behalf be appointed by the said Church, for the purpose of claiming any damages or relief in regard to such censure, if the same shall have been pronounced.' And the defendants say that inasmuch as the sentence by the plaintiff complained of is a spiritual censure pronounced by the Synodical Commission (which is a duly constituted judicatory of the said Church) in the case of a scandal or offence which was brought before it, and proved to its satisfaction, it is not competent for the plaintiff to maintain his action against the defendants in respect thereof. And the defendants further submit to this honourable Court that such spiritual jurisdiction as they claim herein, and in the said annexure, has always been recognized by the Roman-Dutch law; and the defendants say that, inasmuch as the sentence

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in the declaration complained of is a spiritual sentence passed by them in consequence of certain spiritual offences of the plaintiff against the said Dutch Reformed Church, the defendants submit, for the reasons hereinbefore and in the said annexure contained, that it is not competent for the plaintiff to seek to set aside, alter, or in any way impugn the same in this honourable Court. And for a plea in this behalf (should the above exceptions be overruled, but not otherwise) the defendants (nevertheless still respectfully protesting, as in conscience they feel bound to do, against the jurisdiction of this honourable Court, and respectfully urging the validity of their said exceptions) say they deny all the allegations of fact and conclusions of law in the plaintiff's declaration contained and join issue thereon, and pray that his claim may be dismissed with costs of suit." He need go no further than that, although there were other assertions as to the question of the sole authority of the Church set forth in the document which the Court had disposed of, but without referring to the third article of the declaration with regard to the Presbytery of Graaff-Reinet. If that exception was to stand it shut the door to the Court for entering into the matter of the third article of the declaration; for the exception stated that to any man being a member of that Church, the doors of the Civil Courts were entirely closed, so far as matters connected with that Church were concerned. Now, this was not a new pretension. It was a pretension of the Church of Rome. The Pope had set up a pretension to be supreme as head of the Church, and it was a pretension which had belonged to all ages and all Churches. It was and had been the ambition of all priests to claim divine authority, and it was a claim which had been gaining ground for years in Scotland, in England, and in this Colony, first in the English Church and then in the Dutch Reformed Church. But it had been argued as if the State had desired to exalt itself to draw to itself the power of the Church, of which, however, it was easy to see the fallacy; for there had never been a case—he would defy any man to put his hands upon one—in which the Civil Court had desired to arrogate the power of the Church. It had never gone further than to protect the property and

person of a member of the Church against his own Church. And as to the judges of the Civil Court, how were they to exalt themselves? They sat to administer the laws, according to well-defined principles and precedents, not to exalt themselves, but only to administer the law, to the best of their ability, according to law and precedent. But what law and what precedent was there to regulate a Church which closes the door of the Civil Courts to its individual members, and which says: "We hold that it is the duty and that it is within the power of a government professing itself Christian, and acknowledging the Bible as the Word of God and the basis of all salvation, to ascertain and recognize the claims thus asserted by the Church of Christ to be free from secular control." They referred here to the Bible, but all Churches did not agree in their reading of the meaning of the Bible. All said they went by it, but then they had no rule or precedent to guide them in its interpretation, and the Church might be one thing to-day, and another thing to-morrow, and might complain of one set of opinions to-day, and of another set of opinions to-morrow. And then what would be the consequence?—who was to decide who were the heretics? It had been said that day that when the words "the Church" were used in Court, they meant all Churches. Was that what it was the intention of the gentleman to say? Did he mean that the whole Church community was to be deprived of the protection of the law, and thrown upon the tender mercies of the Church? As to the charge of arrogating to the Crown the power of the Church, that Court did not sit to enforce the power of the Crown, but the supereminent power of the law, according to rules and precedents which it could not, and dare not, depart from. The exception, in his opinion, was entirely beside the case. There might be a doubt, perhaps, upon some of the points raised, but the defendants could take them under the general issue. It was one which had been brought forward before, and which had been again and again overruled. The Ordinance No. 7, 1843, had been accepted by the Church. The Ordinance laid down certain rules and regulations for the government of the Church,

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Burgess vs.  
Murray and  
others.

1885.  
May 26, 30.  
—  
Burgers vs.  
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and the Civil Court had a right to interfere when it was complained that these rules and regulations had not been adhered to. In the case of Mr. Kotzé, which had been referred to, he came before them to complain that he had not received a proper trial, and had not received justice according to the rules and regulations of the Church itself; and in that case the Court decided that it was the duty and within the jurisdiction of the Court to interfere. And that was the same question that was raised now by the third article of the exceptions. It had been argued that the Church was a voluntary association, and that its members were bound by their own act in entering it; but the Ordinance provided a mass of rules and regulations for its government, and the question for the Court to decide was, whether it was debarred from interfering to enforce those rules and regulations by the plaintiff's voluntary act. It had been decided in Kotzé's case that to maintain that the Court was so debarred was not good law, and, in his opinion, it was not good law. The Court would neither question the doctrine nor the discipline of the Church, nor interfere in matters of that kind at all. Everything would still remain exactly as it was before the Court interfered, but he was of opinion that the exception ought not to be allowed. But he had forgotten to notice that there was another exception, the second, which ought to be noticed. He would dispose of that by saying that there was no such action before the Court as was therein supposed, no action to prevent the Church from censuring Mr. Burgers. The action before the Court was only that that particular litigant denied that he had had a fair trial according to the rules and laws of the Church itself; and he was of opinion that that exception also must be disallowed.

CLOETE, J., said that in a case which had been previously before the Court, in which the exception now taken was rather pointed out and suggested than dwelt upon, he had pointed out that the Court had a controlling voice in such matters; and that such an exception, if set forth, could not have been maintained. But the defendants now took upon themselves to maintain, that the Church had a precedent

true and proper power derived from the Lord Jesus Christ. That was the large and broad proposition which a certain number of gentlemen, forming an ecclesiastical body recognized by the law, claimed for themselves—that they should be recognized as Christ's Church and to possess a jurisdiction without any control whatever. Being rather surprised that such a proposition should be put forward in that Court, he had felt it his duty, when the reverend gentleman who conducted the defendant's case was addressing the Court, to ask the reverend gentleman whether he was there as the champion of the Dutch Reformed Church only or as the champion of all the Churches in union with that Church? And the reverend gentleman had replied, "For all the Churches." But if so, exclusive of minor divisions, there were no less than seven Churches to which the argument would apply. There were the Roman Catholic Church, the Episcopal Church of England, the Presbyterian Church of Scotland, the Dutch Reformed Church, the Lutheran Church, the Wesleyans, and the Independents, all acknowledging themselves to belong to Christ's Church. Three of these, viz., the Roman Catholic, the English Episcopalian, and the Scotch Church, were established in their respective countries; and if the exception now taken were good for anything, the Court might expect to-morrow to have actions brought against the Roman Catholic Bishop, the Bishop of Cape Town, and the Rev. Mr. Morgan, who represented the Scotch Church, and all three might raise the argument that was raised now. With regard to the claim of the Bishop of Cape Town, the two cases of *Long (a)* and *Colenso (b)* had settled that point at least; but the time might come when the two others might come before the Court to urge and support a similar claim. But, as coming from members of the Dutch Reformed Church, that they should have taken upon themselves to claim such a position had surprised him, and he had taken upon himself at once to point out to the reverend gentleman that there was not the slightest pretension on the part of the Dutch Reformed Church in Holland to exercise any authority as coming from Christ himself, the original

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(a) 1 Moore, P. C. N.S. 411.

(b) 2 Moore, P. C. N.S. 115.

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regulations for the government of the Church having been formed upon the admission that the supreme authority was vested in the sovereign. (The learned Judge here went at great length into the early history of the Dutch Church, and afterwards went on to say:) The regulations of the Church in this Colony were contained in the Ordinance of 1843, and there could not be a pretence for a claim to any greater power than had been given to them by the State and the Crown. The defendants had stated it to be a matter of coercion, but it was not that alone. The plaintiff had stated that his bread and his living were taken from him, and, therefore, he had sought the intervention of the Supreme Court. He had been suspended: suspension was a matter of coercion and legal jurisdiction, and the exceptions must be disallowed.

WATERMEYER, J., said he fully concurred in the conclusion of his brother Judges that the exceptions could not be allowed. The first exception alleged, in effect, that a member of a voluntary association could not go to the Courts of the country to complain of an injury done to him as a member of that association against its rules and in violation of them. It was said, however, that it was more than a voluntary association,—that it was a part of the Church of Christ. He would yield to no man in the respect which he paid to the spiritual authority of the Dutch Reformed Church in this country, but he did not think it necessary at present to enter into the history of that Church. There was much in its history of which those who were connected with that Church might well be proud, and there were many things in its history of which those who were connected with it might be heartily ashamed and which could not be done in the present age. But he thought the history of the Church had been wrongly given, for in this Colony it had no history up to 1824, for there were then very few clergymen here who could have exercised the authority which was claimed for them by the defendant; and from 1824 to 1843 they could not discuss such questions with freedom, because there was always the interference of the Political Commissioner. But then the Church got the

Ordinance of 1843, which was its charter. They had been told, in the course of the argument, that the Church had inherent rights, but the Ordinance expressly disclaimed 'all inherent power and right to affect the persons and property of any of the members of the Church, and the Church itself, in accepting that Ordinance, had disclaimed the possession of inherent power. The plaintiff alleged that he had been dealt with by the authorities of the Church in violation of its rules and regulations, and he asked the Court to inquire whether it was so or not. They were told in the Ordinance that the manner in which the rules and regulations should be interpreted was according to the ordinary principles upon which matters of ordinary contract were proved. And if he were once to admit that a person with whom a contract had been broken could not come before that Court for redress, he should at once abdicate all his functions as a Judge: it would be a denial of justice which the Court could not be asked to make. It might be that when the rules and regulations were gone into it would be found that the plaintiff was bound by them. He would not go into the religious discussion, nor deal with a theological question. He hoped it would not be necessary to do so, for that Court was certainly not the arena for theological discussions; but if a state of things arose such as had been suggested by the reverend gentleman, it might hereafter become the duty of the Court to do so. With regard to the second exception, he perfectly concurred with the Acting Chief Justice (Bell, J.) that it did not touch an action of the nature of that then before them. The action was based upon a declaration that certain rules had not been adhered to, that justice had not been done, and that the judicatory which had tried the plaintiff was not the proper judicatory that should have tried him. With regard to the other contents of the declaration, the general issue would give defendant the right to enter upon them.

BELL, J.:—The judgment of the Court is, that the two exceptions must be disallowed and the case proceed on its merits.

1865.  
May 26, 30.  
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others.



TUPPEN AND ANOTHER *vs.* PETERSEN.

*Buildings.—Quantity Surveyor.—Charges.—Building Owner.*

*When work goes off after a builder's tender has been accepted, the building owner is not liable to the quantity surveyor in respect of his charges for the preparation of bills of quantities on which the builder has tendered. (a)*

1885.  
Aug. 10.  
Tuppen and  
Another *vs.*  
Petersen.

Action by the plaintiffs as architects for a sum due to them from the defendant. The claim was made up at the rate of five per cent. on the contract price of the work done by the builders, and for two-and-a-half per cent. in respect of the preparation of bills of quantities. The facts, however, in regard to the use made of the plaintiffs' plans are not clear enough to enable the decision of the Court on the first point to be understood, or of value as a precedent. It appeared that the builder whose tender was accepted was withdrawn, and the work was done, not under the plaintiffs' supervision, but by arrangement between the defendant and another builder. The plaintiffs had prepared both the plans and the bills of quantities on which the tender was made. In the ordinary course, had the builder whose tender was accepted gone through with the work, he would have charged the defendant a sum for the quantities, and repaid it to the plaintiffs. As this was rendered impossible, the plaintiffs claimed for the preparation of the bill of quantities against the defendant.

*The Attorney-General* appeared for the plaintiffs.  
*Cole and Buchanan*, for the defendant.

THE COURT gave judgment for the plaintiffs' claim at the rate of five per cent. on the contract price, but refused to allow the plaintiffs' claim in respect of the quantities, as, in their opinion, the defendant was not liable in respect of this part of the claim.

[Attorneys for the Plaintiff, FAIRBRIDGE & ARDERNE.]  
[Attorney for the Defendant, TENNANT.]

(a) See the English Cases on this subject collected in Roscoe's Digest of Building Cases, 2nd Edition, London, 1883, p. 44.

## ALFORD AND ANOTHER vs. WILLS.

*Guarantee.—Bankruptcy.—Cession of Claim.*

*The defendant having given a guarantee to the plaintiffs to be liable for R.'s debts to them to the amount of £50, provided their claims against R. should be ceded to him, R. became bankrupt, and paid seven and eightpence in the £. The plaintiffs proved against R.'s estate in respect of their debt, and sued defendant for the balance on his guarantee: Held,—That they were not entitled to recover more than such a sum as made up £50, since the defendant should have been ceded their right against R.'s estate.*

Action to recover the sum of £40 7s. 10d. The defendant tendered the sum of £30 17s. 8d., and the difference was therefore the amount now in dispute.

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Aug. 24.

—  
Alford and  
another vs.  
Wills.

The actual facts on which the case turned were shortly as follows. The defendant had given a guarantee to the plaintiffs, binding himself to pay them to the extent of £50 any claim which they might have on one Roberts, provided he had a written notice of six months, and that the plaintiffs' claim was ceded to him. Roberts became bankrupt, owing the plaintiffs £65; they claimed with other creditors against the estate, and were paid *pari passu* with these a dividend of 7s. 8d. in the pound. They then proceeded for the balance, namely, £40 7s. 10d. against the defendant, who, however, alleged that they were only liable for £30 17s. 8d., on the ground that they should have been allowed to rank against the estate of Roberts as creditors in respect of the plaintiffs' debt, and that they should not have claimed against the estate, and also against him for the balance.

*Cole*, for the plaintiffs.

*The Attorney-General*, for the defendant.

THE COURT gave judgment for the defendant with costs.

[Attorney for the Plaintiff, DE KORTE.  
Attorneys for the Defendant, FAIRBRIDGE & ARDERNE.]

## BRINK'S TRUSTEES vs. DE VILLIERS AND HAUPT.

*Sequestration.—Compensation.—Sale.—Trust.—Ordinance*  
No. 6, 1843, s. 28.

*In July, 1863, B. assigned his estate for the benefit of his creditors ; at that time D. and H. were holders of a promissory note payable by B. in November, which was not paid. In October, M. returned from a journey with a number of sheep belonging to B., and agreed that D. and H. should sell these sheep by auction, and B. authorized the sale. Afterwards B.'s assignees sued D. and H. for the amount of the sale, but D. and H. refused to pay over more than the balance of the sale, after deducting the debt due to them from B.: Held,—That the defendants had the right of compensation, since it was not affected by sequestration, unless it was shown that there was no mutuality of credit, or that the goods were sold under some express or implied trust, which was not present in this case.*

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Action to recover the sum of £314 17s. 5d. The facts and points raised are fully set out in the judgment of the Court.

*Cur. adv. vult.*

WATERMEYER, J.:—In this case the plaintiffs (the trustees of the insolvent estate of Andries Brink, Daniel's son) sue the defendants (De Villiers and Haupt), who are auctioneers at the Paarl, in an action of debt for the sum of £314 17s. 5d., the proceeds of a sale of sheep, held by them on the 23rd October, 1863. The plea of the defendants was substantially compensation. They were at the date of the sale, and as far previous as July, holders of a promissory note by Brink, in favour of one Bosman, for £200, with interest dated July, due 1st November, which was not paid by Brink when it became due; and they claimed that they were entitled to compensate to this amount, and tendered

the net balance, £109 ls. 11d. It appears from the evidence that in May, 1863, A. Brink had sent his son-in-law, D. J. Morkel, on a trading expedition into the country, and delivered him goods and money to the amount of £800, for which the following acknowledgment was given him by Morkel: "I, undersigned, acknowledge to have received from my grandfather-in-law, two waggons complete, with twenty-eight draught oxen, and merchandise according to the account of the merchant, Mr. E. Landsberg, together with cash, together amounting to £830 sterling.

"I bind myself to make a journey within this colony, to barter and sell the aforesaid waggons, cattle, and all that I have received, in the best and most favourable manner, and to return within six months to render accounts, and to give over and deliver the money received, and the bartered cattle to Mr. Brink.

"All the expenses of the journey shall be borne and paid by me, and all profits shall be and remain mine.

*"Cape Town, 21st of May, 1863."*

In July, 1863, Andries Brink had a meeting of creditors. Three creditors were appointed to investigate his affairs, and recommended a surrender of the estate. They found a large deficiency—£11,000. After further meetings, however, it was finally agreed that there should be an assignment, and that Messrs. Eaton and D. A. de Villiers should be the assignees. These gentlemen undertook the duties. The deed of assignment was advertised by them in the following terms:—"Notice is hereby given that the deed of inspection and assignment, executed by Mr. Andries Brink, Daniel's son, in favour of the undersigned, is lying at the office of Messrs. Fairbridge and Hull for the signature of creditors, who are requested to file their claims without delay with the first undersigned, at the office of Messrs. McDonald, Busk, and Co.

"C. R. EATON,

"D. A. DE VILLIERS."

This advertisement, without any date, was inserted in several Cape Town newspapers which the defendants admitted they received—of the 15th and 18th August, and intermediate dates. The deed of assignment was not produced,

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having been lost, nor was a copy produced. But it was admitted that it was agreed that there should be an assignment at the meeting of creditors of the 10th August; that the deed purported to vest the property in the assignees. Whether there was a clause that if all did not sign by a certain date the contemplated assignment should fall to the ground, did not appear. For some time, and to a certain extent, the assignees administered the estate under the proposed assignment; but it was not completed, and on the 19th November, 1863, one of the creditors obtained an order of compulsory sequestration, which was finally adjudicated on the 16th November. The plaintiffs, who had acted as assignees, were duly elected as trustees. In October, Morkel returned from the country. He had in the country heard of the intended assignment and the difficulties of Andries Brink. While passing through the Paarl he saw the defendants, and promised them the sale of the sheep he had bought, if Brink was satisfied with their being appointed the auctioneers. On coming to Cape Town he saw Brink, who, without any notice to the assignees, gave notice by advertisement, in the *Zuid Afrikaan* of the 19th October, of a sale of these sheep by the defendants, on the 23rd, in the following terms:

"400 extra fat sheep.

"200 ditto ditto merinos, with long wool.

"100 ditto ditto wether goats.

"On Friday, the 23rd instant, the above number of cattle will be publicly sold at Klapmuts Station.

"Cape Town, October 16th, 1863.

"(Signed) A. BRINK, D. s.

"De Villiers and Haupt, Vendue-Adm."

The sale took place. On the 4th November, 1863, Brink wrote to the defendants as follows:—

"GENTLEMEN,

"Please make out the acceptance for the vendue-roll of the sheep of Daniel Jacobus Morkel, sold by you in his name, or in my name, as agent of D. J. Morkel. He is hereby authorized to grant you a receipt.

"Your obedient servant,

"A. BRINK, D. s.

"Messrs. Haupt and De Villiers, Paarl."

Upon this, Morkel applied to the defendants for the proceeds of the sale, and was offered the balance, after deduction of the £200-note made by Brink, of which they had been holders since July, and which they had proved in the insolvent estate of Bosman, the payee, on the 29th September, 1863. This balance of £109 he refused to accept, not being authorized by Brink, as he stated in his evidence, to allow the deduction. On the 28th of October, Messrs. Eaton and De Villiers wrote to the defendants as follows:—

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“DEAR SIRS,

“Mr. A. Brink informs us that you have lately sold about 600 sheep and goats on account of Mr. D. J. Morkel, and that you will at our request send us the bill for the proceeds. Mr. Morkel is indebted to Mr. Brink in the sum of £880; the amount, therefore, to be received from him is considerably in excess of the present vendue-roll. He has, we are told, still a waggon and two spare oxen, which he should place in your hands. We should be obliged by your obtaining Mr. Morkel's consent to the proceeds of the sale being sent to us in case of his refusal, that steps may be taken against him.

“We are, &c.,

“C. R. EATON,

“D. A. DE VILLIERS,

“Assignees of the estate of A. Brink, D. s.”

It is observable that according both to Brink's note to De Villiers and Haupt, and the assignees' note, the sheep, goats, &c., are considered not to be Brink's but to be Morkel's. Brink had told them, according to this note, not that De Villiers and Haupt had sold sheep of his, but that they had sold those of his debtor, Morkel, from the proceeds of which they would pay part of Morkel's debt to him. At the same time, he wrote to defendants to pay the amount to Morkel—evidently intending to withhold it from his assignees. This double-dealing on his part has no bearing on the case, except in as far as it is alleged in the declaration that “while the estate was under assignment, a number of sheep and goats belonging to the estate of the

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said A. Brink (Daniel's son) came towards Cape Town from the interior, which sheep and goats were, with the privity and consent of the said assignees, placed in the hands of the said defendants for realization for the benefit of the estate of the said Andries Brink (Daniel's son)." This certainly was not the position of the sheep, according to the letter of Eaton and De Villiers, when, referring to the sale, they spoke of them as Morkel's property. In the question of compensation, when the right in which that which is withheld has been received should be ascertained, the fact that De Villiers and Haupt are told both by Brink and by the assignees that the sheep are Morkel's, has an important bearing on the case. When the assignees, on failure of the assignment and the consequent sequestration, were appointed provisional trustees, they, by letter of the 13th December, 1863, demanded from the defendants, "a settlement of the vendue-roll of sheep sold by you in October last per order of Mr. Brink, on account of his assigned estate," which is consistent with the claim in declaration, but inconsistent with their letter of October. In April, after they were appointed trustees, the plaintiffs again wrote, demanding, "a copy of the vendue-roll of sale of sheep sold by you in October last on account of Mr. Brink." Upon this defendants sent a copy of the vendue-roll, and their account with Brink, showing a balance in the latter's favour of £109. On the 5th May, the plaintiffs, as trustees, demur to the deduction of £200, Brink's note in favour of Bosman, and say: "We must be informed of the peculiar circumstances, if any, that led you to set off this bill against the proceeds of property entrusted to you for sale, on account of the then assigned estate of Mr. Andries Brink." After this, the £109 was tendered to the trustees, the tender refused, and the action brought. On careful consideration of the document signed by Morkel on the 21st of May, 1863, there is no doubt in the mind of the Court that the sheep were in truth Brink's, and not Morkel's; that Morkel was simply Brink's servant in regard to them, and that there was no property in him, either as regards the goods taken on the trading journey, or "togt," nor, as regards the money and sheep, the produce of the trading journey. The *jus in re* in these things was Brink's. There can be no doubt, too, that

the advertisement of the deed of inspection and assignment, and the appointment of the present trustees as joint inspectors, came to the knowledge of the defendants through the newspapers, which it is admitted they received; and further, that the letter of the plaintiffs, as assignees of the 28th October, acquainted them with the fact that they were assignees, if they had not known that *aliunde*. But they never saw, signed, or assented to an assignment in any way; they received the sheep to be sold, not from the assignees under any trust, that, as property of an assigned estate, an account was to be rendered to the assignees; but after they had received them they had notice from the assignees that they were not Brink's property, and with a confirmation by Brink that they were the property of Morkel. They may have concluded at the time, notwithstanding the statements both of the assignees and of Brink, that in truth these were Brink's sheep, as when they claimed a right to compensate, they asserted it; but in the face of the letters of both the insolvent and the assignees, there can have been no agreement on their part to sell on behalf of the assigned estate. Then upon sequestration, what is their position? The 28th section of Ordinance No. 6, 1843, contains the law of compensation or set-off in insolvent estates. It is as follows: "When there has been any mutual credit given by the insolvent and any other person, or where there are any mutual debts between the insolvent and any other person, upon which compensation can by law be pleaded on either side . . . the master or resident magistrate shall thereupon state the account between them, and shall set one debt or demand against the other, and what shall appear due on either side as the balance of such account, and no more, shall be allowed to be claimed or paid on either side respectively; provided that the person claiming the benefit of such set-off had not, when such credit was given, or when the cause of his death accrued, notice of the order for sequestration having been made, or of any act of insolvency in virtue of which such order shall have been made." In fact, the general law of compensation has its full force unless there was notice at the date of the credit given, or accruing of the debt, of the order of sequestration; or, it

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may be added, unless the sale or alienation which gave occasion to the set-off came under the 84th section of the Ordinance, which strikes at intentional preferences. The order of sequestration in the present case was on the 24th November—the act of insolvency on which the order was granted was a return of *nulla bona* in September, on a writ of August, of the Supreme Court. It is not suggested that at the date of the sale on the 23rd of October, the defendants had any notice of the act of insolvency, and their own claim on Brink accrued in July. No preference is challenged under the 84th section of the Ordinance, and there certainly was no intention to prefer the defendants on the part of Brink, when he gave them this sale. The sole question remains whether under the general law of compensation the defendants, creditors of Brink, several months before his sequestration, having become his debtors before his sequestration, are entitled to the extent of their debt to him to compensation, paying the balance to his estate. There have been some decisions in this Court, on the question raised in this case, which it is desirable to examine. The first case was that of *Trustees of Manuel vs. Norden* (a). Norden was a creditor of Manuel on a promissory note. There was a meeting of Manuel's creditors in March, 1844. A statement showing the insolvency of the estate and a deficiency was laid before the creditors. The great majority of the creditors present, to avoid the expenses of a sequestration, passed a resolution, signed by the defendant, that the estate should be assigned to Eaton, the secretary of the Trust and Assurance Company, to be administered by them for the benefit of the creditors—that Eaton thereupon assumed the administration, and proceeded to act in execution of the resolution. In consequence of some of the creditors refusing to enter into the arrangement, the deed was not executed by Manuel. On 8th April, he executed a general power of attorney in favour of Eaton to act for him; a sale of his property was held by Eaton, acting solely under this power, on the 10th April; at this sale the defendant purchased landed property; the assignment never was executed; on

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(a) 3 Menzies, 526.

the 24th April, Manuel surrendered his estate. The trustees sued Norden for the purchase amount of the land bought by him at the sale held by Eaton; he tendered the purchase price, less the note, of which he was the holder before the sequestration, and less the amount of a note of which he had become the holder after the sequestration. The Court sustained his plea of compensation in respect of the former note, but rejected it in respect of the latter: notwithstanding Norden's knowledge of the actual insolvency of the estate, as there had been no order of sequestration, the Court holding that Eaton selling under a power of attorney was in law Manuel himself, and that therefore the debt due by Manuel to Norden, and by Norden to Manuel, were *eodem titulo* in the same right as regarded both. Norden was entitled to the *ius vigilantibus*, which in the present instance was the right of compensation. In order to have obviated this result, Eaton, selling as he intended for the benefit of creditors, ought to have made it a condition of sale that no set-off by means of an existing debt should be claimed. The principle of the decision of this case has never been questioned.

The next case in which a similar defence was raised was that of *Trustee of Muller vs. Steytler*, in 1849, to which reference was made by Mr. Cole in his argument. On the 15th December, 1848, Muller, being in embarrassed circumstances, had a meeting of his creditors, at which Steytler was present, and at which it was agreed that the estate should be assigned to Zeederberg and Mechan for the benefit of all the creditors. A deed of assignment was drawn out, which was signed, among others, by Steytler, but subsequently it fell to the ground, some creditors having refused to execute it. On the 22nd December Muller gave a power of attorney to his intended assignees under the deed to sell all his property for the benefit of his creditors. They employed Steytler as auctioneer, and the sale was held. On the 22nd March Muller surrendered his estate, and his trustee sometime after called upon Steytler to account to him for the proceeds of the goods which he had received for sale from Zeederberg and Mechan. Steytler claimed to be entitled to compensation to the amounts of the sums due to

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& Haupt.

him by Muller, and tendered the balance. The Court, on action brought by the trustee, held that he was so entitled. They called on the counsel for the plaintiff to establish that Steytler had received the goods under any trust that the sale should be for the benefit of creditors. There was no express one, and an implied one could not be made out. Accordingly, the same principle guided the decision as that which ruled the case of *Manuel's Trustees vs. Norden*. It is right to add that one at least of the Judges who tried the case of *Muller vs. Steytler*, in that to which we shall next refer, said that he doubted the inference of fact drawn by the Court, viz., that no implied trust to sell for the benefit of creditors had been proved. It is clear that if the Court had been satisfied that Steytler had taken these goods for sale under a trust that the sale should be for the benefit of all the creditors, compensation would not have been allowed; as they were not so satisfied, it was. It is to be presumed that in a transaction of this nature, before the order of sequestration or notice of this particular act of insolvency, there was a *concurrentia debitorum inter easdem personas*, and no trust unless the contrary were proved. The next case in which the same question was mooted was that of *Beyfus vs. Sutherland and Blackburn*. The facts were these: Gabriel Kilian, a merchant, trading here and at Frankfort-on-the-Maine, being in embarrassed circumstances, on the 31st October, 1848, assigned his property for the benefit of his creditors. The deed was executed by him, by the intended assignees, and by some of his creditors. The assignees were placed in possession of his property and proceeded to sales, the proceeds of which reached the amount of £3000. On the 30th November, 1848, Kilian clandestinely left the colony, and on the 6th December, 1848, he surrendered his estate as insolvent by his agents Norden and Joseph, who held his power of attorney. Notice was given by these agents to the assignees of their intention to surrender the estate on the 1st December. By an arrangement between the assignees and Cape creditors, who held them harmless, a dividend of 10s. in the pound was paid to the latter, with the evident intention of ousting foreign creditors if possible. These payments were made between the 1st and 4th December.

The assignees under the deed were appointed trustees, and they having declined to recover for the insolvent estate the proceeds realized in the assignment, the Court gave leave to Beyfus, a large foreign creditor, to institute this action to recover the amount for the benefit of the estate. It was contended for Sutherland and Blackburn that, as the assignment had failed, they were exactly in the same position as any other creditors of Kilian would have been had they sold Kilian's goods at his request and had retained the proceeds in his insolvency. They were creditors, the one to the amount of £1100, the other of £500, and to these amounts they alleged they were entitled to compensate, though they might be liable to account for the balance. It was attempted to assimilate this case, in all respects, as to the right of compensation, to that of Steytler. The Court, however, held that the defendants had received the property of Kilian in the nature of a trust for the benefit of all the creditors, and in no other character, and, the trust having failed, they were bound to account for the amount, so that in the sequestration all the creditors might have the benefit. Money or property received for a specific trust could not be considered as having come into a trustee's hands in his own right on failure of the trust, and the amount was to be handed to the representative of the person who constituted the trust, to be dealt with in justice to all his creditors. The last case which it seems necessary to notice is that of *Trustees of Higgs vs. Painter* and another, decided 13th August, 1850. The facts were these:—In September, 1848, Higgs was in embarrassed circumstances. Some of his creditors were pressing him. He apparently believed himself to be solvent, and hoped by a sale of his movables, and obtaining a mortgage on or selling his immovable property, he would be able to pay his creditors in full. The defendants were his chief creditors, and were instructed by him, on the 12th February, to draw up an advertisement and sell the whole of his property on the 30th. Two creditors, however, sued Higgs, and in order to induce them not to go on to judgment the defendants signed the following document:—

“The undersigned hereby engage that if Mr. Joseph

1855.  
Aug. 29.  
Brink's Trustees  
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& Haupt.

1886.  
Aug. 29.  
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& Haupt.

McMaster and A. J. Mackenzie withdraw all proceedings which they have instituted against W. Higgs for the ensuing circuit, that the said J. McMaster and A. J. Mackenzie shall receive an equal proportion of the proceeds arising from the sale of W. C. Higgs's effects, which sale has been duly advertised for the 30th, in conjunction with other creditors.

"PAINTER and McMASTER.

"Fort Beaufort, 29th December, 1848."

The sale of the movable property was held as advertised. The immovable property was not sold, and a mortgage could not be obtained. On receipt of the engagement of Painter and McMaster, Mackenzie withdrew proceedings but J. McMaster did not. The latter obtained a judgment against Higgs, on which there was a return of *nulla bona*, and thereupon the estate was compulsorily sequestrated. The trustee claiming the proceeds of the sale of the 30th September was met with a plea of compensation by the auctioneers. It was endeavoured to assimilate the case to that of Muller *vs.* Steytler; but the Court there held that there was a special trust clearly proved. The insolvent had sworn that the defendants had received the property into their hands under the condition of selling for the benefit of the creditors *pro rata*, and that this statement was confirmed by the document signed by them before the sale. Compensation was, therefore, disallowed. The principle that has guided the decisions in all these cases is that sequestration shall not affect the right of compensation by law existing before it actually takes place, unless it be shown that there has in truth been no mutuality of credit; that the debt to the creditor which the defendant endeavours to compensate, and that against which he wishes to compensate it, were not between the same persons; that there has been some special agreement, expressed or implied, by which he undertook to be indebted not to the insolvent, but to all the creditors of the insolvent, although no sequestration has yet intervened. It is clear that in the present instance the assignees themselves could not claim to be entitled to set off, although the assignment failed. If they had employed the defendants distinctly to sell for the benefit of creditors,

the defendants would not be so entitled. But they certainly did not do so, either themselves or through Brink, as appears by the letter of 28th October. But it is argued that the knowledge which, through the advertisement of August, the defendants had of the assignment would constitute an acceptance on their part of this sale as for the benefit of creditors generally. This is a wide conclusion in the case of an assignment of the particular conditions of which we know nothing, and which the defendants never saw, and which never was completely executed. But if this value were given to the advertisement of August, it might be maintained for the defendants that the advertisement of October regarding this very sheep showed that Brink had recovered the control of his estate, and that the assignment had already fallen to the ground. But, in truth, the advertisement cannot to any serious extent either bind or benefit the defendants. On the sequestration they are in this position. They received goods for sale from Morkel, which the assignees and Brink told them were Morkel's. They did not receive them in trust to sell for Brink's creditors. It is found that these goods are Brink's, and not Morkel's. Having sold Brink's goods, not received under any trust, and so having become indebted to Brink, on his sequestration, as he was indebted to them likewise in the amount of £200, they offer to pay the amount which they owe Brink on deduction of what he owes them. The 28th section of the Ordinance distinctly says they have the right. It would be most inconvenient and injurious to disturb the settled law of compensation in business transactions. In estates in which an assignment is attempted in the first instance, to avoid a sequestration, it would be advisable for the temporary assignees to make a special agreement with those with whom they deal that the right of compensation shall be given up, if any existed.

The judgment will be for the plaintiffs for the amount tendered in the plea, with costs to the defendants.

1866.  
Aug. 29.  
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Brink's Trustees  
vs. De Villiers  
& Haupt.

## BARNARD vs. LE ROUX.

*Transfer.—Delay.—Costs.*

*Transfer was ordered to be given to a plaintiff who had failed to ask for transfer for fourteen years, but without costs.*

1865.  
Sept. 14.  
Barnard vs.  
Le Roux.

Action to obtain transfer of a portion of land purchased by the plaintiff. The facts appear from the following judgment.

*Cur. adv. vult.*

WATERMEYER, J.:—The plaintiff claims from the defendant as executor dative of his late mother, the widow, Anna Le Roux, transfer of certain landed property alleged to have been purchased in September, 1840, for the sum of 200 rix dollars, or £15. The following was the instrument of sale: "I, the undersigned, have lawfully sold the quit-rent ground named Wilgeboom, situate at Olifant River, for the sum of 200 rix dollars, to Mr. Adam Barnard, for which I subscribe my name.

"ANNA C. LE ROUX, Widow.

"The amount paid to me.

"As witnesses:

"JACOB HERMAN.

"ALBERT DU PREEZ.

"C. V. BILJOEN." (a)

The deed of sale originally had no date; but in another handwriting the date of 20th September, 1840, is marked upon it. The Court has come to the conclusion that this is a genuine document though stale. The plaintiff is much to blame, for his silence has been the cause of the litigation. Having this document in his hands from 1840 to 1854, he

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(a) It is stated in the newspaper report from which the present report is compiled, that transfer was claimed in 1854; as judgment was given in 1865, this is possibly an error for 1864, as otherwise there would seem to have been a long delay in taking legal proceedings.

made no efforts to obtain transfer, though he paid transfer dues in 1841. He had possession of the property throughout the whole of that time, and upon the widow's death, in 1854, he suddenly became alive to the necessity of taking transfer. He then endeavoured to obtain from the defendant, who was appointed by the Master executor dative of his mother's estate, a power of attorney to get transfer. That was a perfectly proper course, this document being in existence, but the plaintiff set about doing so in a most improper manner. On one occasion he got the defendant when intoxicated to sign a written authority to give transfer, and another time, after the defendant had signed an instrument, he, or some one on his behalf, caused signatures, which are now admitted to be forgeries, to be placed as witnesses to a power of attorney. Under these circumstances, though the plaintiff is entitled to the judgment of the Court, he is not entitled to costs. There was some doubt as to whether the widow had power to dispose of more than half of what had belonged to her deceased husband, but a copy of the will is annexed to the proceedings, and from that it is clear that she had full power of alienation. Transfer must be given within four months.

1865.  
Sept. 14.  
—  
Bernard vs.  
Le Roux.

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*In re C. J. BECKER, an Insolvent.*

*Insolvent Estate.—Rescission of previous Resolution of Creditors.  
—Consent.*

*On an application by an insolvent for an order to certain persons to pay to him certain interest which the creditors had resolved should be received by a creditor, and which resolution had been rescinded by a subsequent resolution.—The Court refused to make the order without proof of the consent of all the creditors.*

Motion on behalf of C. J. Becker, for an order upon the South African Association, and the trustees of the insolvent estate of the applicant, to pay over to him arrears of interest

1865.  
Sept. 14.  
—  
In re C. J.  
Becker, an  
Insolvent.



1865.  
Sept. 14.

*In re C. J.  
Becker, an  
Insolvent.*

which had accrued, and such interest as might accrue upon a *fidei commissa* inheritance administered by the Association, arising from the estate of the applicant's late father and mother, to which he alleged he was entitled by a resolution of his creditors. At a meeting of creditors, held so long ago as 17th April, 1852, it was resolved not to sell the insolvent interest in the inheritance, but to allow Mr. Ross, a creditor, to receive it till his claim should be satisfied, and then that it should be received by the trustees. On August 30th, 1864, another meeting of creditors was held for the purpose of rescinding the former resolution, and of allowing the applicant to receive the interest which might thereafter accrue. The meeting passed a resolution authorizing the insolvent to receive both interest which might accrue and interest which had already accrued. The Association refused to pay the interest to any one but the trustees of the insolvent estate. It further appeared that about £400 of debts still remained unpaid, whilst the accumulated interest amounted to £290.

*The Attorney-General* appeared for the applicant.

THE COURT refused to make the order without evidence that all the unsatisfied creditors concurred in the arrangement, and adjourned the motion for the applicant to bring before them such proof if he could do so.

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*Ex parte C. J. HUMAU.*

*Mortgage Bond.—Cancellation.—Affidavit.*

*When a mortgage bond has been paid, but not cancelled, in an application to the Court to cancel it, there should be an affidavit as to a search for the holder of the bond.*

1865.  
Oct. 14.

*Ex parte  
C. J. Humau.*

Motion for an order for the cancellation, by the Registrar of Deeds, of a mortgage bond in favour of the late J. Barry, which had been ceded to one Otto, and was registered against C. J. Humau. Otto had been paid the sum, but he had

failed to give to the Registrar of Deeds an authority to cancel it. He had left the colony, and could not be found.

1865.  
Oct. 14.  
—  
*Ex parte*  
C. J. Humau.

THE COURT said that they would make the order upon production of an affidavit that every reasonable effort had been made to discover Otto, but without success.

The application was adjourned accordingly.

*Ex parte* J. F. MEYER.

*Executors dative.—Married Woman.—Notice.*

*The Court before making an order for executors dative to pay a fidei commissa inheritance to a married woman whose husband had not been heard of for twenty-five years, required a notice of the application to be inserted in the Government Gazette.*

Motion on behalf of Johanna Frederika Meyer, born Visser, for an order allowing the executors dative of the estate of M. M. Visser deceased, her mother, to pay to her a *fidei commissa* inheritance without the concurrence of her husband, to whom she had been married in community of property, and of whom nothing had been heard for twenty-five years, and who was supposed not now to be living. The motion had been previously before the Court, when it was of opinion that a notice of the application should be given in the Government Gazette. The executors consented to the application.

1865.  
Oct. 14.  
—  
*Ex parte*  
J. F. Meyer.

The notice having been given,

*The Attorney-General* renewed the motion.

THE COURT made the order.

## PREUSS AND ANOTHER vs. AMOS.

*Provisional Sentence.—Mortgage Bond.—Account Current.*

*The plaintiffs included a mortgage bond in an account current, for the balance of which an action was brought, and withdrawn on an application subsequently for provisional sentence: Held,—That the former proceedings did not prevent the granting of provisional sentence on the bond.*

1866.  
Oct. 19.  
—  
Preuss and  
another vs.  
Amos.

Motion for provisional sentence on a mortgage bond for £400. The bond had been included in an account current, for the balance of which an action was brought, but was subsequently withdrawn.

*The Attorney-General*, for the plaintiffs, said that it was true that the Court had held in some cases that the introduction of promissory notes and bills of exchange into accounts current had destroyed their liquidity. But this had been when the note formed part of the general transactions on accounts current between two persons. For example, A and B have an account current between them. A sells goods to B, and charges him with them. B gives a promissory note in temporary satisfaction of the balance against him, which is placed to his credit in the account. The note is not paid at maturity, and the amount of it is then passed to the debit of B. Later on, a balance appears against B, and A takes proceedings on the note instead of suing on the general account. In such a case the Court has not granted provisional sentence, because after the note had reached maturity the account was placed in the same position as if no promissory note had ever passed. But it had never been held that in a case like the present a statement of account in which the bond was included for convenience, could debar the holder for obtaining provisional sentence.

*Cole*, for the defendant, argued that after the withdrawal of the previous action in which the bond figured, defendant could not be sued on it alone.

1886.  
Oct. 19.  
—  
Prouss and  
another vs.  
Amos.

THE COURT said that they agreed with the argument of the counsel for the plaintiff, and granted provisional sentence.

## IN THE MATTER OF AN APPRENTICE.

### *Apprentice.—Departing from Service.*

*An apprentice who ran away to escape punishment was held not to have left the service of his master with intent not to return.*

THE CHIEF JUSTICE:—In this case a boy was charged before a resident magistrate with “departing from the service of his master with intent not to return thereto.” He was convicted and sentenced to two months hard labour. It appeared from the master’s evidence, that on returning home after a short absence, he missed some turkeys. Suspecting this boy, he charged him with the theft, and told him he should fetch a constable, whereupon the boy absconded, and was pursued and captured. Instead of being tried for the theft, he was tried for leaving his master’s service. We think the conviction was wrong, there was no such *animus non revertendi*, as is necessary to make this a legal offence, and therefore the conviction must be quashed.

1885.  
Oct. 24.  
—  
In the matter of  
an Apprentice.

## RHODES vs. COETZEE.

*Trespass.—Boundaries.—Costs.*

*An action was commenced by a summons to declare boundaries, the declaration was for trespass, and the claim as to boundaries was at the hearing withdrawn. The Court gave a verdict for the plaintiff as to the trespass for a nominal amount, but ordered him to pay all costs occasioned by the claim as to boundaries.*

1865.  
Nov. 11.  
Rhodes vs.  
Coetzee.

This was an action commenced by a summons to declare boundaries, and the declaration was framed in trespass. The plaintiff and defendant were proprietors of adjoining farms. At the examination before a commissioner appointed to take evidence, the plaintiff's surveyors abandoned their line of boundary, and agreed with the statement of the defendant's surveyors, and the claim as to boundaries was thereupon abandoned. But a nominal trespass beyond the defendant's boundaries was proved, and the defendant's counsel stated that he would not have resisted the plaintiff's claim if it had been for trespass only.

*Cole and Buchanan* appeared for the plaintiff.  
*The Attorney-General*, for the defendant.

THE CHIEF JUSTICE said, the plaintiff had succeeded in proving a trespass, and was therefore entitled to a nominal verdict, as the action was one of trespass. The amount of damages which the Court would award him would be one farthing. But the result of this case raised an important question of costs. It was a matter for serious consideration whether the defendant should not receive his costs, having been misled by the summons, to treat the dispute as one of boundaries, on which footing, indeed, the plaintiff had conducted his case until he was put out of Court by his own surveyors. Then the action was continued as one for trespass only, on which the plaintiff had succeeded. The Court were of opinion that the plaintiff should pay the defendant

all the costs which the latter had incurred in meeting the claim for boundaries. The costs solely occasioned by the claim for trespass must be paid by the defendant, and the Master must act on this principle at the taxation, though the result would and was intended by the Court to be that the plaintiff would practically pay the defendant the costs of the action.

1865.  
Nov. 11.  
—  
Rhodes vs.  
Costaze.

THE CAPE OF GOOD HOPE MARINE INSURANCE CO. *vs.*  
BERG.

*Charter-party.—Abandonment.—Sale by Shipowner.—Right of Underwriters to Proceeds.*

*C. and Co. chartered the G. to bring a cargo of timber to Table Bay, and agreed to pay freight on unloading and right delivery thereof. The G. was driven ashore in Table Bay, and the defendant, the shipowner's agent, thereupon gave notice to C. and Co. to receive the cargo on the beach on payment of freight, otherwise it would be sold on account of whom it might concern. C. and Co. refused so to do, and abandoned the cargo to the plaintiffs. Defendant sold the cargo, and tendered to C. and Co. the balance thereof after deducting the freight payable. The plaintiffs brought an action to recover the entire price of the cargo: Held,—That as the plaintiffs made no protest against the sale, and in fact adopted it, they could not recover more than the balance tendered to them. Per BELL and WATERMEYER, J.J., the charterers were under the circumstances bound to take delivery of the cargo.*

Action to recover £515, the proceeds of the sale of a cargo of timber.

1865  
Nov. 11, 24.  
1866.  
Jan. 13.

*The Attorney-General* appeared for the plaintiffs.  
*Cole*, for the defendant.

The Cape of  
Good Hope  
Marine Insurance Co. vs.  
Berg.

1865.  
Nov. 11, 24.  
1866.  
Jan. 13.

The Cape of  
Good Hope  
Marine Insu-  
rance Co. vs.  
Berg.

The points decided, and the facts, are fully set out in the following judgments.

*Cur. adv. vult.*

**THE CHIEF JUSTICE:**—The declaration states that on the 8th of March, 1864, a charter-party was duly executed between the defendant as agent for the ship *Galatea*, and Collison & Co., merchants of Cape Town, by which it was stipulated that the ship should proceed from Port Elizabeth to the Knyana and there take on board a cargo of wood, and being loaded should proceed to Table Bay, the said cargo to be discharged at the last mentioned port according to the custom of the port, for certain freight and primage specified in the charter-party; that Collison & Co. effected an insurance upon the cargo with the plaintiffs in customary form for £560; that the ship having loaded a cargo of wood at the Knysna, and having afterwards arrived at Table Bay with the cargo on board, was, on the 17th of May, 1864, and before any part of the cargo had been delivered, driven by the force of the winds and waves upon the beach at Table Bay, and ultimately became a wreck; that the defendant on the 20th May gave notice to Collison & Co., that the ship was stranded and then lying upon the beach of Table Bay, and called upon them to remove the cargo on payment of freight, and that unless these requisitions were complied with, he would cause the wood to be sold for the benefit of whom it might concern; that Collison & Co. were ready and willing to receive the cargo according to the custom of the port of Table Bay, at a proper place of berth in the bay, and to pay the freight as specified in the charter-party, but that Collison & Co. declined to remove, or attempt to remove, the cargo from the ship as she lay amidst the surf, and prepared to abandon the cargo to the plaintiffs as assurers, and that accordingly Collison & Co. in due form abandoned in favour of the plaintiffs. That the defendant on the 22nd May caused the cargo to be sold by public sale, and that he had in his hands the net proceeds thereof, amounting to £515. That although the defendant had due notice of the abandonment he nevertheless refused to pay

the same, whereupon the plaintiffs prayed that the defendant be condemned to pay the same to them with interest and costs of suit. The defendant pleaded the general issue and a special plea setting out the facts, and contending that under the circumstances he was entitled to receive the freight for the whole voyage to Table Bay, amounting to £232, and that he tendered £283, the balance between that amount and the net proceeds of the sale. There was also a claim in re-convention for £232, the amount of the freight. The replication denied the facts in the pleas, and pleaded the general issue to the claim in re-convention. The statements made in these pleadings were either proved or admitted at the trial, and the question the Court has to determine is whether freight was earned, and is recoverable under the circumstances. It was contended on behalf of the plaintiffs that the charter-party must be regarded as the contract entered into between the parties thereto, and that inasmuch as that document stipulated that "freight should be paid on unloading and right delivery of the cargo," and as there had been no delivery in this case, no freight had been earned. There is no doubt that the general rule is, that the contract for the conveyance of merchandise is an entire contract, and that unless it be completely performed by the delivery of the goods at the place of destination, the shipowner will derive no benefit for the time and labour expended in a partial conveyance, and the various authorities cited during the argument by the plaintiff's counsel, fully establish this proposition. It appears to me, however, that this case is one which ought to be decided upon its own particular circumstances. The charter-party, it is true, stipulated that the freight should only be paid on unloading and right delivery of the goods, and if any right of abandonment existed in this case—of which I entertain considerable doubt—and if the plaintiffs, who stood in the place of Collison & Co., had sought by an action to impugn the conduct of the defendant for selling the goods on his own authority instead of retaining them, and enforcing his right of lien by a proper form of action, the Court would have to determine a very different question from that which is raised on these pleadings; but here Collison & Co. being

1885.  
Nov. 11, 24.  
1886.  
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The Cape of  
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1865.  
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The Cape of  
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informed by the defendant that unless the cargo is received by them a public sale will be held by him for the benefit of all who may be concerned, they content themselves with a statement that they had abandoned the cargo to the underwriters; and the plaintiffs, the underwriters who resided at Cape Town, and who must therefore be taken to be cognizant of all that transpired, do not in any way interfere to prevent a sale from taking place by any caution or remonstrance of any kind; and the sale having been effected they adopt it, and claim from the defendant the net proceeds thereof, and, on his refusal to comply with the demand unless his freight was first paid, they commence these proceedings. They, therefore, waive any supposed illegality on the part of the defendant by holding a sale without authority, and contrary to law, for their complaint is founded upon an assumption that the sale was regular, and the declaration prays that the whole of the net proceeds should be paid to them. Although, therefore, looking at this charter-party alone, I should, perhaps, be unable to say that there has been a specific performance of its terms, and that consequently according to the law as laid down in the authorities I have referred to, no freight was earned, I am of opinion that the conduct of the parties must be considered for the purpose of seeing whether they did not waive their strict legal rights, and this Court sitting to enforce the rules of equity and common sense as well as the dry rule which regulates the enforcement of contracts in the Common Law Courts in England, is bound to look at the equities of the case. I adopt the language of Lord Stowell, who said concerning the jurisdiction of the Court of Admiralty, "This Court sits, no more than Courts of Common Law do, to make contracts between parties; but as a Court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place, under a state of facts out of the contemplation of the contracting parties in the course of the transaction."—*The Friends*. (a) It would, I think, be contrary to equity to allow the plaintiffs in this case to receive

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(a) Edwards, 246.

the net proceeds of this sale without paying the freight of the goods. If they had accepted the goods in specie even as salvage, it is clear they would have been liable to pay freight, and I regard the proceeds of the goods in the same light as the goods themselves. An acceptance of goods short at the port of destination always raises a promise to pay *pro ratâ itineris*: *Roccus* on Ships and Freight, Art. 81. 214. And how does that differ in principle from this case where the consignees, and the underwriters who represent them, stand by and allow a sale to take place without making any objection, and then demand the proceeds of that sale. It was said in argument that such a rule would be attended with inconvenience in cases where the goods brought were of a perishable nature, but this I cannot admit. If these goods had been of a perishable nature—so that all had perished—in that case no sale could have been held, and no question as to the right to claim freight could have arisen. But here, as the whole cargo was sold at the port of destination, under the circumstances proved and admitted in the case, and as the underwriters who represent the consignees claim the proceeds of that sale, it can only be allowed to them after the whole freight has been deducted. I may add that a case referred to by my brother Watermeyer during the argument appears to illustrate our decision. It is from *Corin*, as follows: “A question having arisen between De la Faille, merchant at Haarlem, and Steenhuyesen & Co., charterers of the ship the *White Unicorn* respecting freight claimed by the master of the ship from De la Faille, it was maintained by De la Faille that he was not bound to pay any freight, first, because he had promised to pay freight only on the return of the master with his ship to this country; and secondly, that forasmuch as he had by his charter-party, hypothecated nothing else for the freight than the merchandise on board, and as the ship with such merchandise was wholly lost, no freight was payable. The Provincial Court determined the cause against De la Faille, who appealed to the Supreme Court, which absolved De la Faille from the claim note by *Corin*; third, it is in addition to be borne in mind that all the merchandise perished. Otherwise, if in the shipwreck

1865.  
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rance Co. vs.  
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the goods had been saved, the freight would have been payable for goods saved *pro rata* for the time and distance of the work performed according to the Maritime Law." The judgment of the Court will be for the defendant with costs.

BELL, J., after recapitulating the facts, said :—It seems to result from this statement of circumstances that on the 12th of May the *Galatea* had performed her part of the charter-party so far as the voyage was concerned. With regard to the "unloading and the right delivery of the cargo," upon the doing of which the freight was to be paid, the position of the parties was this: the vessel was driven from the usual place of delivery to a place which, so far as regarded this particular kind of cargo, was perhaps more convenient for its delivery than the usual place of delivery. By the terms of the charter the delivery was to be "according to the custom of the port." The custom of the port with regard to the mode of delivery of wood was not proved, but I suppose it is as elsewhere, that the vessel being in the usual place of anchorage, wood is shot through a port, either into the water, where in the form of a raft it is taken into tow by boats which come from the shore on purpose, and conveyed to wherever the owner of the cargo desires, or it is shot directly into the boats and carried by them to the shore. In this instance the vessel was herself upon the beach within fifty yards of high-water mark, and her cargo was shot through a port into the water immediately after the sale, and the whole of it was secured by the purchaser with the exception of a small quantity which was either carried out to sea, or stolen in the confusion of so many wrecks as happened at that time, but which was not valued at more than £3 sterling. The result shows that the owner of the ship was justified in his assertion that the cargo could be delivered; and if Collison & Co. had made any attempt to take delivery there can be no doubt that they could have had actual delivery of the whole cargo in a sound and uninjured state. Instead of agreeing to take delivery, Collison & Co. chose to abandon the cargo. This, I think, considering that the cargo was in the port of

delivery wholly uninjured, they were not entitled in law to do. I think Collison & Co. were bound to take delivery, unless the only mode of delivery possible from the position of the ship was such as would have entailed upon them heavy additional expense. In such a case they would have been entitled to demand from the plaintiffs payment of such additional expense as they might be put to in the particular mode of landing beyond what they would have had to incur if the delivery had been from the usual anchorage place. Upon the refusal of the plaintiffs to comply with this demand, possibly in such a case Collison & Co. might have been entitled to say, "Then we abandon the cargo," but no evidence was adduced that they would have been put to any extra expense. If the owners of the ship had tendered delivery of the cargo without doing more, I am at a loss to conceive any ground upon which the owners of the cargo could have refused to receive it, or have resisted payment of the freight; for, in my opinion, it would be altogether to overstrain the language of the charter, if the Court were to hold that the delivery tendered was not a tender of delivery "according to the custom of the port," because the particular position of the ship had by the force of the weather been changed from the usual anchorage ground to one that, for all that appeared, was more convenient for delivery of this particular kind of cargo than the usual anchorage ground. "Custom of the port" may refer to the mode of delivery, not to the place of delivery, and that it refers to the mode rather than to the place is probable, because of these words in the charter—that the vessel was to "proceed to Table Bay, or *so near thereunto as she may safely get*, and deliver" her cargo. So that a certain latitude was given as to locality of position when delivery was to be made, evidently with reference to the peculiarities of Table Bay as to wind and weather; and it may fairly be said that these words were used in contemplation of what actually happened, by no means an unusual occurrence in this bay. We were told that in truth this case was not one between the plaintiffs, the insurers of the cargo, and Berg, the owner of the ship, but that the true defendant was another company which had insured the freight. If the abandonment

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were good it could only be good upon the footing that the cargo had not been conveyed or had not been delivered. If upon either of these grounds the abandonment were to be sustained, the freight would be recoverable from the insurers of it; but if the abandonment were on either ground, then the insurers of the freight would not be answerable for it to the shipowners. And yet we were told by the defendant that he had nothing to do with the abandonment. In my opinion the question of right to abandon is so much mixed up in this case with the right to demand freight that it is impossible to consider the two questions separately. In all the cases which have hitherto come before the Courts, so far as the books disclose, abandonment has been made in some place short, however short, of the place of delivery, so that the voyage had not been performed. The peculiarity in the present case is that the abandonment took place in the actual port of delivery, and after an offer by the shipowner to deliver the goods uninjured by sea water. So much are the two questions of freight and abandonment of cargo connected in this case, that if I had felt that the defendant had not made out a case for payment of the freight by the owner of the cargo, I should have felt constrained to refrain from liberating the plaintiffs from liability until I had given the defendant an opportunity of bringing the insurers of the freight before the Court, lest after having in this action liberated the owners of the cargo, or the plaintiffs as in their place, from liability for freight, the Court might find itself in a subsequent action constrained upon other facts and arguments also to liberate the insurers of the freight from liability. It is clear also that without the concurrence of Collison & Co. or the plaintiffs, the defendant would not have been entitled to sell the cargo within the twelve lay days allowed by the charter-party. When the case was opened to the Court, not only did the defendant maintain the propriety of the sale, but singularly enough the plaintiffs echoed their approbation of it. We were told from the bar on both sides that neither party offered any objection, that they both concurred in its propriety at the time. In the view I then took, and have always taken of this case

I was at a loss to understand the case of the plaintiffs. It has never appeared to me, and does not appear now, that the plaintiffs ever had any ground for objecting to payment of the freight of this cargo, unless on the ground of damage received through the sale of it by the defendant. I am of opinion under these circumstances that, so far as the question of freight is concerned, the plaintiffs, by assenting to the sale and demanding by this action the proceeds of the sale, have, in fact, received delivery of the cargo. They have received the money's worth of the cargo, instead of its bodily substance, and, therefore, are liable to pay the freight of the transport of the cargo from the port of shipment to the port of delivery, in which last the cargo was sold, and in which its proceeds are claimed by them. Such being my opinion, it is unnecessary for me to go into the question of tender, but if I were obliged to do so, I should be of opinion that no legal tender had been proved. I shall only observe in conclusion that if the plaintiffs are advised that they have sustained injury by the sale of the cargo, it is open to them to try that question in an action for the purpose against the defendant. There are not any processes under which it can be disposed of in the present action.

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WATERMEYER, J.:—No case exactly similar to this appears to have occurred in England, Holland, France, or America, so far as we can ascertain from the books. But it seems to me not difficult to arrive at the right conclusion by the application of the same principles of maritime law which have produced the decisions that have taken place. If there be any difference between the law of England and the law of Holland on the subject, the latter must prevail. It is, indeed, desirable never to lose from view that, to use Lord Mansfield's words and adopt his quotation, in *Luke vs. Lyde* (a) "the maritime law is not the law of a particular country, but the general law of nations: *non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.*" And it is to be regretted that the

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(a) 2 Burr. 882-888.

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tendency of the later English decisions has been rather to depart from this wholesome rule; indeed the very case in which these remarks were made by that eminent Judge, so much so, that the Attorney-General in his argument maintained it had been virtually overruled. I scarcely think, however, that this has been so to the full extent suggested. I shall briefly summarise what has been clearly established in our law, and admits of no doubt. It is clear that if instead of completing her voyage by entering and anchoring in the harbour of Table Bay, the *Galatea* had been wrecked on the rocks at Green Point; if her cargo of timber had washed ashore and had been conveyed either by the owner of the ship, or by the merchant to the latter's warehouse, the merchant would have been bound to pay full freight for what was received by him, the shipowner being liable for the carriage from the scene of wreck to the place where the merchant was entitled to claim the timber. In like manner, if, on entering the bay, she had struck on the Whale Rock, and had gone to pieces, and the timber floating about had been picked up by fishing-boats and had thus been conveyed to the merchant, the latter would be liable for the freight of all the timber he received—the shipowner to pay the cost of conveyance from the place whence the timber was brought. So strong is the doctrine that under such circumstances the shipowner has earned his freight, under deduction only of the expense of conveyance to the place of delivery, that there is good authority for holding that in such circumstances salvage services rendered in saving the wood, would be borne, not by the shipowner who was to convey the goods, but by the merchant. A very interesting case on the subject is found in the *Commercial Decisions of Barel's*. By the terms of a charter-party, a ship was to leave Amsterdam for a port of France, there take in a cargo of salt, thence proceed to Memel, there load a cargo of hemp, deals, &c., and thence to Amsterdam. At Memel, the master was to be paid by the charterer's agent such sums as he might require there for disbursements on account of the ship, which was to be considered as part payment of freight, not to be repaid, whatever the result of the voyage, the remainder to be paid on delivery of the Memel cargo at

Amsterdam, "and not before." The voyage to the French port was safely effected, the salt discharged at Memel, the Memel cargo laden, and the ship arrived safely off the Texel Roads. She stood off Texel for a pilot, but none came. At night, a storm rising, the vessel was wrecked on the island, Terschelling. She soon went to pieces, the timber floated about, and was saved by fishing-boats. The Magistrate of Terschelling sent the property thus saved to Amsterdam, in lighters, making a salvage claim on behalf of those through whom the property had been rescued. These lighters arrived at Amsterdam, and the merchants received the goods, before the master of the ship came there. On his arrival he claimed freight. The case went through four different Courts. The Delegated Judges for Maritime Causes of Amsterdam held that he was entitled to the freight, deducting only the lighterage from Terschelling to Amsterdam, on all the cargo that had been delivered, the expenses for salvage service falling on the owner of the goods. The Local Magistracy of Amsterdam reversed this decision, inasmuch as they held that though the ship was entitled to freight, the expenses for salvage service were to be borne by the ship, in addition to the lighterage. The Court of Holland, on appeal, affirmed the original decision, which was further affirmed by the Supreme Court of Appeal; so that the ship was declared to have earned her full freight on what was delivered, on deduction only of the charge for conveyance from the point from which she could no longer convey it to the place of destination. It is observable that in none of the Courts was the contention that freight had not been earned at all. And this, notwithstanding the condition in the charter-party, that freight would be due on delivery by the ship-master, on his arrival with his ship in the port of Amsterdam, of the cargo laden at Memel, and "not before." Shipwreck—a portion of the goods being saved—will not prevent the shipowner from being entitled to his freight for any such portion, *pro rata itineris*, if the merchant shall take the goods at such point—for the whole voyage, if the shipmaster shall convey what is saved to the port of destination; or if it shall have been so conveyed at his expense, by persons acting as *negotiorum*

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*gestores*, though not authorized by him to act on his behalf. The 16th and 37th articles of the Wisby Maritime Law, the foundation of the Maritime Jurisprudence of Northern Europe, and the 40th article of the Statute of Charles V.—the Dutch Maritime Law, as well as the 3rd article of the Statute of Philip on the subject—in fact, the universal Maritime Law, all tend to this conclusion. It may be doubtful whether, notwithstanding the high authority of President Bynkershoek and Professor Van de Keessel, who approve of the decision I have cited, even as to salvage expenses, these ought not to be borne by the ship. But, as before remarked as to the freight, no doubt exists in the circumstances. Thus it is established by authority that freight would have been earned if the vessel had struck on the Whale Rock, on such timber as Collison & Co. might have received. In the present instance, the *Galatea* completed her voyage; the contract *vehendarum mercium* was completed safely; what remained to be done was to be a concurrent act of the shipmaster and goodsowner—the latter within twelve days to receive, the former to deliver, in the ordinary way, this timber. In strictness of law, the contract of carriage had been fully performed; a contract of deposit remained, the shipmaster being the depositary in his ship, as he might have been in a warehouse, of the timber, on which he had a lien for his freight. Now the storm arises, and the ship is stranded. The shipmaster may be in a better position as to freight than if he had not completed his voyage; he cannot be in a worse. It is plain that if the *Galatea* had broken up at once and the whole cargo of timber had been washed ashore, so as to be to the profit of the merchant, the latter would have been liable for the whole freight. The ship was stranded on the 17th. On the 19th the defendant offers delivery of the cargo. The reply is, in fact, that the ship being stranded, no delivery could be made. This was an error in law. The act of God rendered delivery impossible in the exact terms of the charter-party, but an effectual delivery to the merchant's profit was quite possible. Collison & Co. did not say that it was too dangerous at the time to take the delivery offered; they will not have the timber at all, because it cannot

be delivered at the anchorage. On this the defendant might have offered to land the timber exactly as it was landed afterwards. If he had done this, and charged the expense of landing to Collison & Co., I have no doubt that his lien on the timber for freight would have remained: and this should, in strictness, have been his course. But I cannot say that the defendant was not justified through the conduct of Collison & Co. in the sale. The owner of the goods says that he will not take delivery. The place of deposit is in a state of danger, and cannot continue the place of deposit. Notice is given by the shipmaster that by the act of God, he cannot continue the depositary, and that he will sell the goods for the benefit of all concerned. There is no objection stated to this. The sale takes place without protest, in the presence, as it were, of the owner of the goods. After this, Collison & Co. desire that the proceeds of the goods so sold shall be paid to the Cape of Good Hope Insurance Company, to whom the right and title have been assigned. So far from the sale being repudiated it is ratified and homologated. I do not care to inquire what the timber sold for at the sale; whether for twice as much as the value, or for half the value, it would not affect the question of freight. In the present instance I cannot but say that this case appears to me to be one in which the merchant having had the benefit of the conveyance of his goods, having refused to receive them after a completed voyage, and having, in fact, assented to their sale, and deriving the benefit of the sale, refuses payment of the conveyance which has enabled him to have these benefits. I have not considered it necessary to inquire into the abandonment to underwriters at all.

Judgment accordingly, for the defendant, with costs.

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## MAYNARD AND THE WYNBERG RAILWAY CO.

*Examination of Witnesses.—Non-commencement of Action.*

*In an application to examine a witness before a summons had been issued: Held,—That it must be refused, although the party applying was willing to issue a summons for perpetual silence, on which the examination might take place.*

1865.  
Nov. 14.  
Maynard and  
the Wynberg  
Railway Co.

Motion on behalf of the Wynberg Railway Company for an order for the examination, *de bene esse*, of one Smith, who was about to leave the Colony for England. Maynard claimed against the Company for a supply of gravel, but had not then issued his summons. The Company anticipated that he would do so after Mr. Smith had left.

*The Attorney-General*, for the Company, said that if the Court had a difficulty as to making the order before a summons was issued, the Company would issue one for perpetual silence against Maynard on which Smith might be examined.

[BELL, J.: How can a witness be examined before the pleadings are filed?

*The Attorney-General*: In numerous cases orders have been made for the examination of witnesses before the pleadings have been filed.

CLOETE, J.: Only in the case of captains or sailors of ships about to sail, and even then not until a summons setting forth the grounds of the action had been issued.]

THE COURT refused to make the order.

## LASKER vs. CRAPPER.

*Agreement.—Party Wall.—Estoppel.*

*The defendant agreed with A. and B. that if he were allowed to open a window in a certain party wall he would close it up on receiving one month's notice in writing. A. and B. assigned their premises to the plaintiff, who gave the stipulated notice, with which the defendant refused to comply on the ground that he had discovered, since the making of the agreement, that the wall was his own property.*

*Held,—per THE CHIEF JUSTICE and BELL, J.,—That the wall was defendant's property, but that he was bound by the agreement.*

*Per WATERMEYER, J.,—That it was unnecessary to decide as to the ownership of the wall, for the defendant was estopped by the agreement.*

Action to compel the defendant to close a certain aperture or window opening.

It appeared that a certain wall divided the premises of the plaintiff and defendant. Into that wall the defendant, under an agreement made between himself and Messrs. Taylor and Hellett, the then owners of the plaintiff's premises, on 1st May, 1861, had inserted a window, which he undertook, by the said agreement, to close up at any time on receiving one month's notice in writing. On 8th of March, 1865, the plaintiff gave the defendant the stipulated notice. The defendant refused to comply with the notice on the ground that he had discovered, since making the above agreement, that the wall in question was not a party wall, but belonged wholly to his premises. Evidence was called.

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1866.  
Jan. 12.  
—  
Lasker vs.  
Crapper.

*The Attorney-General, for the plaintiff, argued that the evidence showed that the wall in question was a party wall. If it were not, the defendant was, nevertheless, estopped*

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from asserting the contrary against a third party, since that third party had altered his position in consequence of defendant's written agreement.

*Cole*, for the defendant, argued that on the evidence this was not a party wall. Also, the agreement having been made under the *bonâ fide* belief that this was a party wall, the defendant, on discovering the mistake, had the right to back out of his agreement—at any rate, as against third parties, even if not against those with whom the agreement was originally made.

*Cur. adv. vult.*

1866.  
Jan. 13.

THE COURT [THE CHIEF JUSTICE and BELL, J.] held that the wall was upon the evidence proved to be the defendant's wall. But they also held that he was bound by the agreement to remove the window.

WATERMEYER, J., declined to give an opinion on the ownership of the wall, but based his judgment for the plaintiff, on the ground that the defendant was by the agreement of 1861 estopped from the right of the plaintiff as assignee of Taylor and Hellett's premises to require the removal of the window.

Judgment for the plaintiff, without costs.

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### TUDHOPE vs. THE SOMERSET EAST BANK.

*Banking Company.—Parties.*

*In an action against the chairman and directors of a bank, it was excepted that the trustees were the proper parties to be defendants. Held,—That the exception was well founded.*

1865.  
Nov. 30.  
Tudhope vs.  
The Somerset  
East Bank.

Action by the plaintiff, as manager of the Standard Bank of British South Africa, in the Colony, against the chairman and directors of the Somerset East Bank. The case now came on for argument upon certain exceptions taken by

the defendants, the one upon which the Court came to a decision being that the two trustees of the Bank, and not the defendants, were the proper persons to be made parties to the action.

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*Cole*, for the plaintiff.

*The Attorney-General*, for the defendants.

THE COURT considered it enough to give judgment in the second exception, and held that it was a valid exception, and therefore gave judgment for the defendants with costs.

*In re A. BRINK (an Insolvent), ex parte PORTER, HODGSON, & Co.*

*Practice.—Insolvent Ordinance No. 6, 1843, s. 27.—Proof of Debt.—Reduction.*

A creditor's proof was admitted by the Master, and was afterwards partially disallowed by the trustees.

Held,—*Per THE CHIEF JUSTICE*,—That the trustees were not at liberty to reduce an account admitted by the Master, but should have applied to the Court for the purpose.

*Per BELL, J.*,—That the practice adopted by the trustees was correct.

The trustees reduced the account of a creditor's proof by an amount previously obtained from another bankrupt in respect of the same debt: Held,—That the deduction was properly made, as proof was only allowable for the residue of the debt.

Application by Messrs. Porter, Hodgson, & Co., for a rule *nisi*, calling on one Eaton, the trustee of the insolvent estate of A. Brink, to show cause why he should not be required to amend the distribution account filed by him in the Master's office.

*In re Brink  
per 26*

1865.  
Nov. 28.  
1866.  
Mar. 1.  
*In re A. Brink  
(an Insolvent),  
ex parte Porter,  
Hodgson, & Co.*

1865.  
Nov. 26.  
1866.  
Mar. 1.  
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*In re A. Brink*  
(an insolvent),  
*ex parte* Porter,  
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One point was as to the propriety in regard to the practice of the trustees disallowing part of a proof admitted by the Master, and the next was as to the right of Messrs. Porter & Co. to prove against the insolvent estate for the whole amount of their debt without first giving credit for a sum received by them from the estate of one Fourie in respect of the same debt.

*The Attorney-General*, for Messrs. Porter & Co., argued that the trustees had acted contrary to the practice of the Court in the manner in which they had treated this proof, and were wrong in law in reducing its amount. He referred to *Berge* on Suretyship, p. 447, *ex parte* Bloxam (a), *ex parte* Vere (b).

*Cole*, for the trustee.

*Cur. adv. vult.*

1866.  
Mar. 1.  
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THE CHIEF JUSTICE:—An objection was filed with the Master to the second account and distribution of the trustees in this estate, on the ground that the trustees had, without authority, deducted certain items from the proof of debt. It appeared that Messrs. Porter, Hodgson, & Co. had proved for a considerable sum before the Master as concurrent creditors, and amongst the items was a claim of £597 17s. 11d. on the following promissory note given to them by the insolvent:—

“Cape Town, 16th January, 1863.

“Six months after date I promise to pay to Messrs. Porter, Hodgson, & Co., or order, the sum of five hundred and ninety-seven pounds seventeen shillings and eleven pence for value received.

“A. BRINK, D. s.”

This note was given by the insolvent in a transaction which one Fourie had with Porter, Hodgson, & Co., who had supplied him with goods to the amount of the note, treating him as being their debtor in their books, but at the same time they stipulated that the insolvent should also give his promissory note for the amount. Fourie, before the

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(a) 6 Vesey, 449, 800.

(b) 1 Rose, 281.

insolvency of Brink, paid Porter, Hodgson, & Co. £105 8s. (less £9 put to Fourie's own credit), and subsequently became insolvent. Porter, Hodgson, & Co. considered that if they did not receive more than 20s. in the pound altogether, they might by law claim as creditors for the full amount of Brink's note, and they proved accordingly. The trustees, when they made out their distribution account, claimed to deduct the payment which had been so made by Fourie, and they reduced the amount of the proof by that amount. The first question raised in this case, therefore, is whether the proof should be allowed to stand without deducting Fourie's payment; and it appears to me that Porter, Hodgson, & Co. ought to have proved minus the payment. The insolvent Brink was responsible that Fourie should pay for the goods sold to him. In other words, Brink became liable to pay for them; but, on ordinary principles, a payment on account made by Fourie *pro tanto* discharged Brink. In a late case, *Ex parte Taylor (a)*, Lord Justice Bruce lays down the general principle on the subject. In that case, a bill of exchange had been drawn by Rogers & Co. on the bankrupt, and accepted by him before his bankruptcy. It was made payable to the order of the drawers, and was endorsed by Houghton to the London Joint-Stock Bank, and when it came to maturity it was dishonoured. Payments of some dividends on account of the bill had been made, and some months afterwards the bankruptcy took place, and proof of debt was allowed by Commissioner Holroyd, but, as was alleged, not for a sufficient amount. The Commissioner had reduced the proof by the amount of the sums which had already been received, and they now contended that they were entitled to prove against the estate of the bankrupt for the whole amount for which the bill of exchange was drawn. That was the contention before the Court. Lord Justice Bruce said that according to the general rule of bankruptcy, which he thought a wholesome and a rational rule, the appellants were not entitled to prove for more than the balance remaining due after

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(a) 3 Jurist, N. S. 753.



1885.  
Nov. 26.  
1886.  
Mar. 1.

*Re A. Brink*  
(an Insolvent),  
ex parte Porter,  
Hodgson, & Co.

deducting the sums so received by them from persons liable to them either directly or indirectly; and to him (Lord Justice Bruce) there appeared no ground for making the present case an exception, if, indeed, under any circumstances, there could be an exception to that rule, the payments having been made by reason of the liability of the persons making the payments as parties to the bill. Two other items were disallowed to the trustees: one an item of £37 10s., which represented a payment to that amount made by one De Vos to Porter, Hodgson, & Co., before Brink's insolvency, in reduction of Brink's liability on a note for £96 9s. 6d. This case is, in principle, precisely similar to the payment made by Fourie, and for the reasons already given the proof ought to be reduced by the amount of De Vos's payment. The other item of £53 18s. 3d. depended upon the question whether the insolvent had, in fact, become responsible for a debt to that amount incurred by one De Villiers, but I understood during the argument that a decision on this question was withdrawn from our consideration. A further point relating to the practice in insolvency was raised in this case quite irrespective of the merits. As I have already said, the Master allowed the proof of Porter, Hodgson, and Co., as concurrent creditors, in the usual manner; but the trustees, having received an intimation of the payments by Fourie and De Vos in reduction of their respective debts, altered the proofs as settled before the Master, and made up the distribution account for an amount minus the payments, and in a note appended to the account explained the reasons why the deductions were made. It has been contended before us that it was not lawful for the trustees to alter the amount of the proofs without the consent of the creditor whose account was objected to, but that in such a case an application to this Court was necessary; and it appears to me that the trustees have no such power to alter a proof after it has been duly admitted by the Master or resident magistrate. Section 27 of the Insolvent Ordinance, No. 6, 1843, enacts "That every creditor shall prove his debt against the said estate to the satisfaction of the Master or resident magistrate, as the case may be, who shall admit any debt or reject

the same as not proved." And then the section, after going on to show how the proof is to be made, proceeds: "That it shall and may be lawful for the Supreme Court, or any Circuit Court, on the application of any party interested, finally to admit or reject any debt accepted or rejected by the said Master or resident magistrate; and provided also, that any such Court, before adjudging finally as to the admission or rejection, may remit such case to the Master or resident magistrate for further proof, or may direct any question of fact to be tried by pleadings and proofs, and adopt such other course as to such Court shall seem fit." This appears to me to vest the authority over proofs first in the Master or magistrate, with a power reserved to any party interested, which includes the trustees, to apply to this Court for relief. I can find no clause in the Ordinance which expressly gives a power to alter proofs to the trustees, nor does such a power arise, in my opinion, by implication. It is true that a creditor may object to the distribution account filed by the trustees—section 110—but that has reference to many objections other than objections to the amount of proof, such as illegality of charges made by trustees, the order of the legal preference of preferent creditors, and a number of other cases. The Master has reported that the practice has been to discuss in this Court alterations in proofs which have been made by trustees as an objection to the allowance of the distribution account; but, if I am right in my construction of the Ordinance, no practice since 1843, however continuous, can be set up against its express provisions.

BELL, J.:—Let me dispose of the question of practice first. Porter & Co. complain of the act of the trustees in framing the distribution account upon an alteration of a proof of debt, which they had made against the estate, as an act not warranted either by the powers of their office or by the practice of the profession. They insist that the proof before the Master is conclusive as to every one until it shall be set aside by this Court, and that if the trustees desire to have it set aside, their course was to have applied to this Court by petition or motion for that purpose.

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On the other hand, the trustees insist that what they did was within the line of their duty, and that if the creditor had any ground to complain, his course was to move the Court for a rectification of the distribution account. The determination of this preliminary question must depend upon the construction to be put upon the 27th section of the Insolvent Ordinance, taken in conjunction with the 108th to the 112th sections inclusive. It seems to me on reading the 27th section that the proof there provided for, to wit, the affidavit of the creditor that the debt is "just, true, and lawful," is not, and was not intended to be, more than an assertion upon oath by the creditor, that, but for anything that he knew or believed, there was nothing either in law or justice militating against his proving the debt upon the estate; leaving the proof open to all objections, in fact or in law, that any one interested might be able to bring against it; that, in short, the affidavit of the creditor is a mere protection of the estate, so far, against proof by a creditor of a debt known to himself to be neither just, true, nor lawful. His affidavit must necessarily depend upon opinion as well as fact, and though true so far as the creditor is concerned, may, upon facts known to, or opinions ascertained by the trustee, the insolvent, or by other creditors, be altogether erroneous. It would seem to me to be therefore inexpedient that the trustee, when proceeding to frame his distribution account, should not be entitled, or rather bound, in the exercise of a duty to the general body of creditors, to deal with each proof, according as he has derived information in regard to it, instead of having his hands tied until he shall have taken the initiative in applying to this Court. It is just possible that there may be several proofs in a sequestration open to objection upon grounds in law, or in fact, not known to the creditors in them at the time of making their affidavits, but which would at once be assented to by them so soon as disclosed by the trustee. By the 108th section the trustee is directed to form a plan of distribution, specifying, first, such creditors as are preferent by law, in the order of their preferences; and, secondly, the concurrent creditors. Upon looking into the proofs upon the estate, the objections in the case supposed against the several

creditors may be such as, if well founded, would take away their character of creditors altogether. Nevertheless, according to the contention of Porter & Co., it would be the duty of the trustee to treat the debts proved, as debts upon which a dividend was payable, and to allot a dividend according to the plan of distribution, leaving it to the insolvent, under section 110, or to any party interested in the estate, to object to the plan of distribution, and under section 111, to move this Court for an alteration of the plan; but the insolvent, or any party interested in the estate, may lack both means and inclination to object, and the creditors may be wholly ignorant of the objection. To meet this, it was said that the trustee might take the objection by motion or petition to this Court, either before making his plan of distribution, or after he has made it. In the first place, there is nothing in the terms of section 108 which authorizes the trustee to take such a course. By that section he is to specify the creditors, but no authority is given him to bring the creditors before the Court to have his specification authorized by it; and in the second place, it would seem to be very clumsy legislation to require the trustee to make out a plan which at the time he knows to be erroneous, leaving it to him to come to the Court to have the error corrected. But, moreover, he does not seem to be one of the parties authorized by section 110 to make these objections; these are, "the insolvent, or party interested, or any creditor." The only one of these designations under which the trustee could by any possibility come would be that of a party interested; but it would be straining the language beyond its obvious meaning to say that the trustee is a party interested in the estate. As trustee he has no interest beyond his commission. With regard to the practice, I have made inquiry of the Master, and I learn from him that he is not aware of any case in which a trustee, before making his plan of distribution, has come to the Court for authority to deal with any particular proof, in a given manner, nor of any case in which, after having made his plan of distribution, the trustee has come to the Court for its amendment according to objections taken by himself. In all cases, the trustee deals with the proofs in making his plan of distribution, according to his

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1886.  
Mar. 1.

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(an insolvent),  
ex parte Porter,  
Hodgson, & Co.*

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Nov. 28.  
1886.  
Mar. 1.

*In re A. Brink  
(an Insolvent),  
ex parte Porter,  
Hodgson, & Co.*

own judgment of their correctness, and leaves the creditors, who may feel themselves aggrieved, to object to his plan, and have their objections disposed of under the 111th section of the Ordinance. This was the course followed in the present case by the trustee, and, in my apprehension, correctly followed. So much for the preliminary objection in regard to the powers of the trustee. I quite agree with the Chief Justice in the opinion that no practice of the profession can set aside the positive enactment of the Ordinance; but I refer to the practice as confirming my opinion of what the practice ought to be, in conformity of my construction of the enactment. I come now to the merits of the objection taken by the trustee to Porter & Co.'s proof of debt. The first objection upon the merits, is as to the item £597 17s. 11d., proved by Porter & Co. It appears that four days before that proof was made by Porter & Co., they had received from Fourie £105 8s. Fourie was one of their customers to whom they sold goods to the amount of £597 17s. 11d., but to whom they refused to sell without security for payment of the price of the goods. This security he gave in the form of a promissory note, for the amount of his purchases made by Brink, not to Fourie, but to Porter & Co.; being the note proved. Previous to this purchase, Fourie was indebted to Porter & Co. in £9 upon an open account. It is conceded that Porter & Co. were entitled to apply the £105 8s. to extinction in the first place of the £9. This would leave £96 8s., which, if deducted from £597 17s. 11d., the original amount of Fourie's debt, would leave him debtor to Porter & Co. in only £501 9s. 11d. The contention between Porter & Co. and the trustee, is in regard to whether Porter & Co. are entitled to prove against Brink's estate for the original amount of Fourie's debt, or for the balance remaining due by Fourie. Porter & Co. insist that they are entitled to prove for the original amount, and to take dividend upon it, so long as that dividend, together with the money received from Fourie, shall not exceed 20s. in the pound of Fourie's original debt. If the note given by Fourie to Porter & Co. had been a note by Brink to Fourie, in liquidation of a debt owing by Brink to Fourie, which

Fourie had given to Porter & Co. in security of his (Fourie's) debt to Porter & Co., I apprehend that there could be no doubt that Porter & Co. would be entitled to receive either full payment of such a note, or such dividends, as Brink's estate would pay upon it, so long as the money so received should not, together with the dividends paid by Fourie's estate, exceed the amount of Fourie's debt to them (Porter & Co.). For this there are several authorities so far back as the case of *Ex parte Crossley* (a). Of the same nature was the case of *Ex parte Bloeam* (b). There the Chancellor, Lord Loughborough, refused to allow the creditor to claim upon the full amount of a bill of the third party; but that judgment was reversed (6 Ves. 600) by Lord Eldon on a rehearing. In conformity with the judgment of his lordship in another case, arising out of the same bankruptcy, to be found in 6 Ves. 448, the decision in *Ex parte Parr* (c) was to the same effect. But in the present case there was no debt owing from Brink to Fourie, in respect of which either Fourie, or his assignees, Porter & Co., could have claimed payment either from Brink while solvent, or from his estate after sequestration. The only debt which ever existed was that arising out of the purchase by Fourie from Porter & Co. It was in security of this debt that the note by Brink to Fourie was made by Brink, and given by Fourie to Porter & Co. The obligation of each of the parties—of Fourie and of Brink—is that each of them shall be liable, *in solidum*, for the payment of the debt; and although the form adopted was that of making Brink a direct debtor to Porter & Co., yet the evidence shows that the true nature of the transaction was that Fourie was the real debtor, and that Brink was only his surety. Now the measure of the liability of a surety, is the liability of the principal. So soon as Fourie paid any part of his debt, the debt was to that extent extinguished as far as Fourie was concerned, and, by necessary consequence, it was also extinguished as far as Brink was concerned, viewing him as a surety only. If Brink be not viewed as a surety, but as a co-principal

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(a) 3 Bro. 237.

(b) 6 Ves. 448.

(c) 18 Ves. 65.

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1868.  
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debtor with Fourie, which probably is the more correct view of the matter, this will not, in my opinion, alter the result. At the time at which Porter & Co. claimed upon Brink's estate, the £96 8s. had already been received from Fourie, and the original debt of £597 17s. 11d. had already been reduced to £501 9s. 11d., so far as regarded both the principal co-obligants. I am at a loss to see any principle upon which the obligation thus reduced could be reintegrated, because of the accidental circumstance of Brink, one of the co-obligants, having become insolvent, to the effect of entitling the obligee to rank upon his estate for the full amount of the obligation. In the Institute, under the title "De Duobus Reis stipulandi et promittendi," this doctrine is laid down: "Ex hujus modi obligationibus et stipulationibus solidum singulis debetur, et promittentes singuli in solidum tenentur. In utraque tamen obligatione una res vertitur; vel alter debitum accipiendo, vel alter solvendo, omnium perimit obligationem, et omnes liberat." By the payment from Fourie the obligation was to that extent extinguished. This is in conformity with the cases in England, which show that it makes no difference in ranking upon the estate of one co-obligant, that the payment was made by the other co-obligant. For this *Ex parte Biswick* (a), and *Ex parte Lefevre* (b), and *Cooper vs. Pepys* (c), are authorities. In *Ex parte The Royal Bank of Scotland* (d), Lord Eldon recognized as a general rule in bankruptcy, that proof may be made to the full amount of a bill against the estate of every person who is a debtor upon it; but that if previously to the proof part of the debt had been recovered from any person, the proof can only be for the residue. I am of opinion, therefore, that in respect of Fourie's debt, Porter & Co. can only claim upon the estate of Brink dividends upon £501 9s. 11d., the balance of the original debt, after deducting the £96 8s. paid by Fourie, and I am happy to find that the more modern case referred to by the Chief Justice confirms the opinion which I had formed before I knew of the existence of that case. The observations I have made will dispose of the second objection to the account.

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(a) 2 P. Wms. 89. (b) 2 P. Wms. 407. (c) 1 Atk. 106. (d) 19 Ves. 310.

Vos bought of Porter & Co. goods to the value of £96 9s. 6d., and in security of payment gave them a note by De Villiers for £37 10s., and Brink's note for the full amount of £96 9s. 6d. Upon the insolvency of Brink, Porter & Co. proved upon his estate for the £96 9s. 6d., but they had already before then received payment of De Villiers's note for £37 10s. The account therefore was correct in limiting the proof upon Brink's estate in respect of Vos's debt to the balance of £96 9s. 6d., after deducting the £37 10s. paid by De Villiers. With regard to the third objection, I understood with the Chief Justice that that was given up, and that I understand to be now assented to.

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The CHIEF JUSTICE said that as the Court was divided in opinion upon the main point—the application was upon the ground that the trustee had acted without authority in reducing the proof; it did not touch the merits of the case—the justice of the case would be met by each party paying their own costs.

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#### TRUSTEES OF BLACKBURN vs. LANDSBERG AND ANOTHER.

##### *Promissory Note.—Alteration.—Right of Holder.*

*The payee of a promissory note for £100 fraudulently altered the amount thereof to £200, and indorsed it over to the defendants, by whom it was indorsed to the plaintiffs for the purposes of the original payee obtaining cash from them. The note not being paid at maturity, the plaintiffs brought an action for the full amount thereof: Held,—That they were entitled to recover the amount for which the note was originally made only.*

Action by the plaintiffs, the holders of three promissory notes, nominally of £200 each, to recover that sum on each. The defence was that the notes were originally made for £100 each, and were fraudulently altered by the payee.

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*The Attorney-General* was for the plaintiffs.  
*Cole*, for the defendants.

The facts were proved by *vivâ voce* evidence, and arguments followed thereon.

The facts and arguments fully appear from the following judgments.

*Cur. adv. vult.*

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THE CHIEF JUSTICE:—The plaintiffs were trustees of the insolvent estate of Joseph Blackburn, deceased. The declaration stated that on the 15th August, 1859, one Johannes Stephanus Cilliers made his promissory note, and thereby promised to pay one Jacob Daniel Cilliers, or his order, four months after date, £100, and delivered the same to J. D. Cilliers; that on the 22nd August following the said J. S. Cilliers made and delivered to J. D. Cilliers another similar note for £100; that on the 30th August, 1859, the said J. D. Cilliers applied to the said Joseph Blackburn to discount the said notes, each of them having before then been so altered as to purport to be a note of £200, and each of them bearing the indorsement of the said J. D. Cilliers, and next of the defendants. That Blackburn, either not observing the alteration, or believing that such alteration had been made with the consent of all the parties whose names were upon the notes, discounted the same for the said J. D. Cilliers as notes for £200 each. The declaration then set out a precisely similar transaction in respect of a promissory note, dated 5th December, 1859, at four months after date, also made for £100, and discounted by Blackburn as a note for £200. After averring non-payment of the notes on maturity, it was alleged that the defendants denied their liability to pay the notes by reason of the alterations aforesaid: whereupon the plaintiffs contended that notwithstanding the alterations, the defendants, as indorsers, were liable to pay the genuine and original amount of £100 for which each of the notes were drawn. The defendants pleaded the general issue, and three special pleas. 1st. That Blackburn, to whom J. D. Cilliers indorsed the notes, acquired such rights only against the parties to

the notes as the said J. D. Cilliers himself possessed, and that the plaintiffs possessed no right of recurrence against the defendants, inasmuch as J. D. Cilliers was a prior indorser to the defendants. 2nd. That by the fraudulent alteration of the notes by J. D. Cilliers without the knowledge of the defendants, and after their indorsement of the same, their indorsement became vacated, and the defendants ceased to be liable to pay the notes or any part thereof. 3rd. That since the maturity of the notes, J. S. Cilliers's estate was insolvent, and that it then became the duty of the plaintiffs, or Blackburn, as holders of the notes, to prove the amount thereof against his estate, so as to be able to cede such claims to the defendants in case the defendants should subsequently have to pay the amounts of the notes. That J. S. Cilliers's estate paid 16s. 7d. in the pound, but that no claim having been made, and the liquidation accounts of the estate having been confirmed, no proof could then be entertained; and the defendants submitted that they were, by this default, relieved from paying the amount of the notes, or, at all events, any sum beyond the difference between that which might have been realized from the estate and the amount actually due on the notes. The replication, after joining issue on the pleas, pleaded specially, and after admitting that the names of the defendants did appear as indorsers of the notes next after or underneath the name of J. D. Cilliers as payee and first indorser, and also that J. D. Cilliers as last indorser, did again indorse the notes after or underneath the names of the defendants, alleged that the defendants were not indorsers in the ordinary course of trade, nor were the notes delivered to them by J. D. Cilliers, but that they placed their names as indorsers solely in order to give additional credit to the notes and to facilitate the discount thereof by J. D. Cilliers, and with intent that J. D. Cilliers should obtain money upon the notes as carrying with them the security of the defendants as indorsers. A further replication alleged that the notes were indorsed by the defendants to enable J. D. Cilliers to obtain money to pay over to the defendants to the credit of his account with them: and issue was joined by the defendants. These pleadings raised

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questions of considerable importance to the mercantile interests in this Colony. The principal point may be shortly stated. Is the indorser of a note, the amount of which has been increased by forgery after his indorsement, but before the note became due, liable to be sued by the holders of the note on its maturity for the true sum which originally appeared on the face of the note? It is singular that no case was quoted at the bar, either from the English or any other code of laws, which has exactly decided this question. We must, therefore, guide ourselves by reasons to be drawn from the special nature of the contract entered into by the defendants when they indorsed the notes; and I confess that from the commencement of the arguments I was much struck with the apparent injustice which would arise if the indorser, upon the faith of whose name the forged note, as in this instance, was discounted, should be enabled by the turpitude of a third party, to whom he had passed the note with his indorsement upon it, to evade the payment of the true sum for which he had originally bound himself. A decision to this effect might, in a commercial country like this, where commerce is so extensively carried on by means of bills of exchange, be attended with the most serious consequences. Bills lying in a bank, and not arrived at maturity, might be altered by any stranger who could obtain access to them, in the amount or sums for which they were originally drawn; and thus all the indorsers would be relieved altogether from the liabilities they had originally incurred. Some strong arguments, or a series of well-considered decided cases, would be necessary, in my opinion, to induce this Court to arrive at such a conclusion. It seems to me to be a proposition contrary to the first principles of justice. It is true that in the English Courts of Common Law the forgery of a bill has usually been considered to be an obstacle to the recovery of the amount for which it was originally given from any of the parties who had indorsed before the fraud was committed, but it will be found, on a careful examination of the authorities, that in several of the cases the operation of the Stamp Laws prevented altered bills from being given in evidence, and in others the stringent rule which was by the ancient law applicable to the alteration of deeds in a material parti-

cular was gradually applied to bills of exchange and promissory notes. Here the plaintiffs were not driven to rely entirely upon the evidence afforded by the bill itself. The defendant, Mr. Landsberg, was examined, and he stated that he gave his indorsements to the three notes for the express purpose of enabling J. D. Cilliers to raise money for his own purposes by discounting them. If such a case as this had not been presented to the Court of Chancery in England, I am not prepared to say that relief would not be afforded to an innocent party who had thus been induced to part with his money, at all events to the extent of the sum originally appearing on the note. Few authorities were cited from the Roman-Dutch writers. In *Van der Linden*, page 688, it is said: "If the drawee has paid a bill in which the name of the drawer has been forged, he has no remedy against the drawer, and if the sum has been increased by forgery, he cannot recover beyond the true sum," and he cites *Van de Keessel* and *Pothier*. Some other points were raised on the pleadings. One, that the money which had been raised by J. D. Cilliers by discounting the notes with Blackburn was paid over to the defendants, to the credit of his account, and that the indorsements were given to enable J. D. Cilliers to obtain money for this purpose; but no evidence was offered to support this statement, and the evidence given by Landsberg completely disproved it. He stated that the indorsements were made by him, without consideration of any kind, and solely to enable J. D. Cilliers to obtain money for his own purposes. Then it is said that the defendants can only be made liable for the difference between the amount for which the notes were originally drawn, after deducting the sum which Blackburn, or his trustees, might have obtained if the amounts due on the notes had been proved in the insolvent estate of J. S. Cilliers, the maker of the notes; but no authority was cited to show any obligation or duty on the part of the holders of an overdue note to make such proof for the benefit of an indorser, who had failed to take up and pay the note after non-payment by the parties primarily liable. The defendants could have proved on the estate if they had discharged the notes, and thus become the holders of them. But there is another ground upon which we think

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that the defendants ought to be relieved from the payment of the third note, bearing date the 5th December, 1859. Blackburn was in the habit of discounting bills of exchange to a very considerable amount; in fact, he carried on an extensive business as a discounter of bills. It was shown by the evidence of Mr. Syfret, the trustee of his estate, that a cheque and counterfoil for £380, drawn by Blackburn in favour of J. D. Cilliers, were found amongst his papers, representing the sum given when he discounted the two first notes, bearing date the 20th August and the 30th August respectively, but no cheque, counterfoil, or any other evidence whatever could be found to show that J. D. Cilliers received cash in respect of the note of the 5th December, 1859. Under these circumstances it was strongly pressed upon us that Blackburn received this note as a renewal of one of the former notes, which would have fallen due in the same month of December; and as the proof on this point is so unsatisfactory, and as Blackburn would not have been likely to have paid cash without the intervention of a cheque, or without leaving some trace in his books of so unusual a transaction; the judgment of the Court in favour of the plaintiffs must be confined to the two earlier notes for £100 each and the interest thereon. The plaintiffs having, however, satisfactorily proved their case as to the principal part of their claim, they will be entitled to the costs of this action.

BELL, J., entered into an elaborate review of the law of England in regard to alterations of bills of exchange and promissory notes, and examined critically the various cases recorded in the books. He said he was afraid no doubt could be entertained that ever since the case of *Master and Miller (a)* (with the exception of one case, *Catton vs. Simpson*,) (b), promissory notes or bills of exchange, altered in any particular, and no matter by whom, after their issue and without the knowledge of the original parties to them, had been treated as nullities—not merely as vitiated—leaving the extent to which they had been vitiated as

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(a) 4 Term Rep. 320.

(b) 8 Ad. and E. 136 (overruled by *Gardner vs. Walsh*, 5 E. and B. 83.—EDITOR).

subject for inquiry with a view to ascertaining the just liabilities of the parties, but as absolute nullities. He acknowledged that it was the duty of this Court to assimilate its judgments as nearly as possible to those of the mother country, as one means of maintaining the unity of the empire; and that, moreover, it was specially their duty to do so in questions of mercantile law, which, for the general benefit of mankind, ought as nearly as possible to be universal and not national. Yet he felt constrained in this case to give his judgment in opposition to those to be found in the English law-books, because he found that they ran contrary to the doctrines laid down in the works of the Roman-Dutch jurists, which in this case must be paramount when they ran counter to the English authorities even in the law merchant: *Allen vs. Kemble* (a). The learned Judge then proceeded to quote from the works of *Voet*, *Van der Keessel*, and *Van der Linden*, and also from *Pothier* and *Pardessus*, all of whom concurred in the opinion that the maker and indorser of a bill of exchange or promissory note remained liable for the amount of the note at the time of its making or indorsement, notwithstanding its subsequent falsification. And this doctrine seemed to him to be more consistent with sound reason and pure justice than the doctrine that the drawer of a bill for a sum which he justly owed to another should be relieved from all liability by reason of an alteration made upon his draft by himself, perhaps, or by a party whose name appeared upon the draft, or even by a mere stranger. He was, therefore, of opinion that the plaintiffs were entitled to recover upon the first two notes to the extent of £100 upon each note. As to the third note, there being no record in Mr. Blackburn's books that any money had been paid to Cilliers for the note, it seemed to him that the plaintiffs ought not to recover against the defendants. In regard to the other defences, he concurred in the opinions expressed by the Chief Justice.

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WATERMEYER, J.:—The rule in our law in reference to legal obligations, where forgery is committed by the altera-

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(a) 6 Moore's Privy Council Cases, 314.

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tion of a genuine instrument, is that, if possible, the exact terms of the instrument in its genuine state should be ascertained. The forgery has vitiated the instrument, not destroyed it, and the endeavour should be to eradicate the vice, and, as regards the parties to the instrument, to place it in the position in which it was before the fraudulent alteration. If it were possible by chemical agency to withdraw from the paper exactly the alteration and no more, the genuine writing alone would appear. On sufficient evidence the law arrives at this genuine writing. In the present instance the evidence is abundant. The defendant has himself established that he placed his name at the back of promissory notes made by J. S. Cilliers in favour of J. D. Cilliers for £100, with the object that on the strength of his (the defendant's) credit money should be obtained on these notes. This was his genuine liability on each of them. After he had thus entered on this liability Cilliers fraudulently altered the £100 to £200, and on the notes thus fraudulently altered obtained money from Blackburn. It is clear that Blackburn, who dealt with the forger, must suffer for his want of caution in not observing the alteration. But our law does not allow the defendant to escape from his genuine liability because Cilliers cheated Blackburn out of £100 on each of the notes. As regards Landsberg, we restore the original note, and he pays no more than he bound himself to do. Cilliers' fraud injures Blackburn, but neither injures nor may benefit Landsberg. Whatever the form of the note, he had undertaken that if these notes were discounted by Blackburn, he, the defendant, would be liable for £100 on each, if not paid when due by Cilliers; and to the undertaking our law holds him. I shall add from the latest Dutch book on bills of exchange (*Kist* on Bills, p. 166) a clear statement of the law there, as I think it is here likewise. I do so the more readily as the writer states that there was no legislation on the subject in the new codes, but that the law continued as before. "Where the amount in a bill of exchange has been fraudulently altered, there is a distinction whether the alteration has taken place before or after the acceptance. Upon this the acceptor's obligation will depend. If the alteration have

been made after acceptance, the acceptor will be in the same position as the drawer; his acceptance has been falsified as well as the original bill. As soon, therefore, as the falsification is proved he may insist on paying only the actual genuine amount. He has not bound himself for more, for at the time of acceptance the bill expressed only the original sum. For this sum he accepted. If the falsification took place before the acceptance, and the acceptor has accepted for the falsified amount, then the acceptor would be compelled to the payment of the falsified amount, for he bound himself for that amount. His recourse lies against the perpetrator of the falsification." The same rules, *mutatis mutandi*, apply necessarily to indorsers in the position of Mr. Landsberg. I concur with the rest of the Court in thinking that the third note is probably one in renewal of one of the first two, and the judgment should be for £200 with interest.

Judgment accordingly for the plaintiffs for £200 with interest and costs.

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STOLL vs. POOCK.

*Act No. 3, 1864.—Prosecutor.—Costs.*

*The Attorney-General being the proper person to prosecute for an offence against the Stamp Act, 1864,—The Court quashed proceedings by a private individual, with costs.*

Motion to remit a fine of £3 imposed by the Resident Magistrate of George Town, on one J. A. Stoll, on the prosecution of one Pocock, for contravening the 23rd section of the Stamp Act, 1864, by selling senna leaves without having taken out a licence as an apothecary, chemist, and druggist. Against the original conviction an appeal had been taken to Cloete, J., in circuit, when the learned judge, being of

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opinion that the proceedings were irregular, referred the matter to the Attorney-General, to see if he could prosecute.

*Buchanan*, for the motion.

*The Attorney-General* stated that he was of opinion that he could not intervene in cases already adjudicated on, and that he alone could prosecute for penalties.

THE COURT agreed with the view of the Attorney-General, and made an order setting aside all the proceedings, with costs against Pocock.

# SWELLENDAM BANK vs. VOLSOHIK.

## *Provisional Sentence.—Notice.*

*Verbal notice of the payment of a sum due under a mortgage bond is not sufficient notice on which to grant provisional sentence.*

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Bank vs.  
Volschik.

Motion for provisional sentence on a mortgage bond for £300, with interest payable on three months notice by the mortgagee. It was shown by affidavit that a verbal notice of the proper length of time had been given to the defendant.

*Cole*, for the plaintiff.

*The Attorney-General*, for the defendant.

THE COURT refused to grant provisional sentence, on the ground that a verbal notice was not a sufficient notice.

**CLOETE (*Appellant*) vs. HEROLDT (*Respondent*).**

***Ordinance No. 5, 1848, s. 2.—Distribution of Water.***

*The Resident Magistrate, by Ordinance No. 5, 1848, s. 2, has power to enforce the distribution of water, under the Resolutions of the Governor and Court of Policy, of January 30, 1805, Nos. 8 and 9. (a)*

Appeal from the Resident Magistrate of Stellenbosch, suing absolution from the instance. The appellant, the plaintiff below, was the owner of Zandvhet, a farm on the lowest part of the Eerste River, and nearest the sea. The respondent owned a farm higher up the river. In January water became very scarce, and none reached Zandvhet. Application was then made to the Resident Magistrate, under the 8th and 9th Regulations of the Governor and Court of Policy of January 30, 1805, who gave notice to the owners of farms on the river that they must confine the use of their water to necessary purposes. It appeared, however, that the respondent took a stream of water out of his dam, which he justified on the ground that his farm was under a servitude to supply water to the farm of Klein Vridenburg.

1865.  
Dec. 9.  
—  
Cloete  
(*Appellant*) vs.  
Heroldt  
(*Respondent*).

(a) "viii. That each of the proprietors of farms along the Eerste River shall take care that the gutters by which he leads the water to and over his farm shall always be kept clear to prevent the water from being spilled; that the water shall not be used for any other than necessary purposes, and that the same after such use shall again be led out to the river in a proper manner. Excepting, however, the farm of A. van der Byl, from which the water is led off not directly to the river, but to the farm of P. G. van der Byl named Welmoed.

"ix. That so soon as any one of the before mentioned proprietors of farms along the Eerste River finds that the water diminishes perceptibly and to his prejudice, he shall be bound to give immediate notice thereof to the landdrost, who then, with the heemraden, shall make such an arrangement, according to circumstances, as shall tend to give to each, who shall be entitled thereto, a proportionate use of the water of the Eerste River, to which arrangement all and each of the proprietors of farms along the Eerste River shall be bound to submit."

1865.  
Dec. 9.  
—  
Cloete  
(Appellant) vs.  
Heroldt  
(Respondent).

The appellant then brought his action for damages against the respondent.

*The Attorney-General*, for the appellant, cited *Cloete vs. De Villiers (a)* as showing that this action would lie.

[THE CHIEF JUSTICE: Under the proviso in the second clause of Ordinance No. 5, of 1848, the Resident Magistrate would seem to have power to enforce all the regulations of 1805.]

*Cole*, for the respondent.

THE COURT were of opinion that the appeal was not maintainable, and that proceedings should be begun *de novo*; for they stated that the Resident Magistrate has power, by Ordinance No. 5, 1848, s. 2, to enforce the regulations of 1805 by making a distribution of the water in accordance with these regulations.

*In re C. A. JACOBUS DU PLESSIS, an Insolvent.*

*Practice. — Confirmation of Account. — Act No. 6, 1843, ss. 111, 112.*

*The Court refused to reopen an account after it had been confirmed by the Court, since the creditors had not, after lodging objections, proceeded to move the Court to amend it.*

*Held, — That the trustees should move to confirm the account after notice.*

1865.  
Dec. 30.  
—  
*In re C. A. Jacobus du Plessis, an Insolvent.*

Motion that a judgment of the Court confirming the distribution account filed by the trustees should be set aside and the account reopened. The Master had by inadvertence

(a) *Quære De Wet vs. Cloete*, 1 Menzies, 405. See also *Myburgh and others (Appellants) vs. Cloete (Respondent)*, 3 Menzies, 564.

reported the account to be free from objection, when, in fact, objections had been lodged against it.

*The Attorney-General*, for the motion.

[WATERMEYER, J.: Why did not the objecting creditor follow up his objection in the manner prescribed by section 111 of the Insolvent Ordinance, which provides that any person who objects to the account shall apply to the Court on motion, calling on the trustees and on the persons whose interest might be affected to show cause why the plan should not be amended.]

*The Attorney-General* said it was not usual for the objecting creditor to take any steps until the Master had reported to the Court that there were objections to the account.]

*Buchanan, contra.* He argued that by section 112 of the Insolvent Ordinance the confirmation of the account by the Court should have the effect of a final sentence.

THE COURT, in refusing the application, said that the confirmation must be regarded as a final sentence of the Court. Persons who objected must take the regular steps prescribed by the Ordinance for the purpose. The trustee ought, under section 112, to instruct his solicitor to instruct counsel to move for the confirmation of the account; but the Court would make it a rule for the future not to entertain an application until notice thereof had been given to the objecting creditor. Creditors must, however, henceforward clearly understand that if they did not follow up their objections they would be nugatory.

1885.  
Dec. 30.  
In re C. A.  
Jacobus du  
Ploem, an  
Insolvent.

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# CASES

DECIDED

## IN THE SUPREME COURT.

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### PART III.

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*In re* WALKER AND DU TOIT.

*In re Walker Buck 68*

*Trustee.—Insolvency.—Removal.*

*The Court removed a trustee of an insolvent estate who had himself become insolvent.*

Application by a trustee for the removal of his co-trustee, who had become bankrupt.

1886.  
Jan. 11.  
*In re Walker  
and Du Toit.*

*Cole*, for the application.

[BELL, J.:—There is nothing in the Insolvent Ordinance rendering it imperative that a trustee should be removed for insolvency.]

After some discussion,

THE COURT made an order for the removal of the insolvent trustee, and directed that a special meeting of creditors should be convened for the purpose of electing a new trustee.

PART III.

2 A

OOSTHUIZEN AND OTHERS *vs.* MOEKE.*Will.—Children's portion.—Valuation.*

*When by a mutual will the survivor is left sole universal heir to pay to the children when they become of age, or marry, such amount as he or she shall, according to conscience, find to be due. Held,—that each child was entitled to something over and above its legitimate.*

1868.  
Jan. 16.  
—  
Oosthuizen and  
others *vs.*  
Moeke.

Action to compel the defendant, the widow and executrix of T. S. Moeke, to amend the liquidation account filed by her, and for other purposes. The main point raised was as to the portion to which each child was entitled under a mutual will made by the defendant and her late husband. It was also objected that landed property should have been sold and the proceeds distributed, and not have been merely appraised by valuers and the amount thereof distributed. The following judgment was delivered by

WATERMEYER, J.:—The important question in this case arises as to the effect in a mutual will of an institution of the survivor “as sole and universal heir or heiress in all the common estate, nothing excepted, to be adiated and possessed by the survivor as free and allodial property, with the condition that the survivor shall be held and bound to educate and bring up the child or children of the marriage, already born or yet to be born, in a decent and Christian manner until they shall become of age, or be married, or enter some other approved state, when to each of them for, or instead of father’s or mother’s portion (bewys) shall be paid such amount as the survivor, according to conscience, in the position of the estate shall find to be due (behooven).” After a careful consideration of the principle by which the Court should be guided—for there is no direct authority on the subject—the conclusion arrived at is that the survivor is not entitled to cut off his children with the mere legitimate. The will, it is true, makes the survivor sole heir, but notwithstanding she is not the sole heir, unless the children

take *titulo institutionis* they do not take at all. Strictly such a will might be deemed inefficacious, and would have been so by the Roman law. The more liberal construction of the Dutch law allows the will to be read as if the children were instituted, and thus *ex necessitate* it must be read as if the survivor and the children were joint heirs. During the minority of the children the survivor remains in possession of the entire estate. When they attain their majority, the survivor must give to each such amount as he or she shall, according to conscience, in the position of the estate find to be due. If without sale the survivor can pay the amount the estate need not be sold. The survivor must value conscientiously, and on an honest valuation calculate the children's shares. It is not to be presumed that the testator intended the children to have the legitimate merely when he did not say so. The children are to have as paternal or maternal portions what shall really be such portions on an honest valuation of the estate, to which captious objections are not to be made. The forcing of a sale, as was attempted by the plaintiffs in this case, with the ostensible object of ascertaining the true value of the estate, cannot be allowed; unless there is fraud, the Court should not interfere with the valuation. It is true that by this view a large discretion is given to the survivor, but upon consideration there can be no doubt that it is the one which rightly interprets the wishes of the testator in regard to the portion of his children. The plaintiff's objections on the main point must be overruled; but as it is admitted that there have been some omissions in lesser details in the account, each side must pay their own costs.

1886.  
Jan. 16.  
Oosthuisen and  
others vs.  
Moeka.



## REDELINGHUYTS AND OTHERS vs. HOFMEYR AND POWRIE.

*Articled Clerk.—Contract.—Cancellation of Articles.—Joinder of Attorney.*

*Articles of Clerkship were cancelled on the ground that, firstly, it was improper for an articled clerk to transfer an agency himself to an attorney, and to receive a salary as consideration ; secondly, that it was a fraud on the Court not to disclose such conduct in the articles. Held, also, that the attorney in an application to cancel the articles should be joined as a respondent.*

1866.  
Jan. 20.  
Feb. 24.  
—  
Redelinghuys  
and others vs.  
Hofmeyr &  
Powrie.

Motion on behalf of Redelinghuys, Reed and Fairbridge, three of the attorneys of the Supreme Court, calling on J. C. Hofmeyr to show cause why an order should not be granted declaring that he had forfeited all benefit which he might otherwise have derived from articles of service made, between R. J. Powrie, an attorney of the Supreme Court, and himself, by which he agreed to serve Powrie for five years in the profession of attorney at law. The ground of the application was that Hofmeyr had, since the date of the above articles, carried on the business of a bill discounter, and that his time was occupied by business, had been, and was still, and that he was a director of the Protection Assurance Company, which prevented him from learning his business as an attorney. At the commencement of the case Powrie was not joined as a respondent, but by consent he was during the case so joined to avoid the necessity of a subsequent motion. Also during the case the Court pointed out that the motion should have been for an order to cancel the articles, and the case proceeded on this footing. The applicants produced an authority endorsing the proceedings, from seventeen of the practising attorneys in Capetown.

*Fairbridge*, for the applicants, cited *Fraser's Case* (a) as showing that the application could be made before the articled clerk applied for admission as an attorney.

[*WATERMEYER, J.*, referred to *The Side Bar vs. Patersen* (b)]

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(a) 1 Burrows, 291.

(b) 1851.

as to the attorney to whom the clerk was articled being made a joint respondent.]

*Fairbridge* argued that an articled clerk during the term of his apprenticeship is debarred from undertaking any business on his own account. He referred to the English text-books and to *ex parte* Llewellyn (a). The affidavits filed by the applicant showed, he urged, that Hofmeyr carried on the trade of a money lender, often taking usurious rates of interest.

[THE CHIEF JUSTICE:—Is there an affidavit by Powrie stating distinctly the duties which Hofmeyr performed in his office.]

*Fairbridge*:—There is only a general averment in the affidavit.

[THE CHIEF JUSTICE :—That is not sufficient. There must be an affidavit such as I have indicated, supported by the production of documents, the work of Hofmeyr as clerk. The case must be adjourned for their production if possible.]

An affidavit was filed by Hofmeyr stating that there had been an agreement between himself and Powrie, by which Hofmeyr agreed to make over to Powrie all his business connections, and that in consideration of Hofmeyr's services as his clerk, Powrie would pay him a salary of £300, which by an agreement was afterwards reduced to £150.

THE COURT expressed a strong opinion that the terms of this agreement should have been incorporated in the articles of clerkship, and called on

*Cole* for the respondent. He argued that there was nothing improper in a person who, like Hofmeyr, was an agent, and who desired to become an attorney, transferring his business to an attorney, and receiving as consideration a yearly salary.

THE CHIEF JUSTICE:—I think the public are much indebted to the gentlemen who have brought this matter

1866.  
Jan. 20.  
Feb. 24.

Redelinghuys  
and others vs.  
Hofmeyr &  
Powrie.

1866.  
Jan. 20.  
Feb. 24.

Redelinghuys  
and others vs.  
Hofmeyr &  
Powrie.

before the Court. If this kind of arrangement were permitted, it would enable any person to become an article clerk by transferring his business to an attorney. Without going into all the matters stated in the affidavits, the articles must be cancelled upon the following grounds:—In the first place, it was an irregular and improper contract made between these parties to transfer the agency business of the clerk to the master, the clerk receiving compensation by a salary. Secondly, a fraud has been practised on the Court by filing, in pursuance of the rule of the Court, a document which was not a true record of the contract between the parties.

The articles must be cancelled with costs against the respondents.

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THE TRUSTEES OF THE ESTATE OF A. A. J. JONKER vs.  
THE EXECUTOR DATIVE OF ADOLF JONKER DECEASED.

*Insolvency.—Will.—Condition.—Right of Trustees.*

*When land or property is left by a testator among his children at a certain valuation and subject to the condition that each child who takes it may only sell his portion, if he desires to sell it, within the family at the value at which he took it, and one of the children becomes a bankrupt. Held,—That his trustees in insolvency must either take the share tendered with the condition, or renounce it entirely and claim the insolvent's proper legitimate portion.*

1866.  
Feb. 3.

The Trustees of  
the Estate of  
A. A. J. Jonker  
vs. The Executor  
dative of  
Adolf Jonker,  
deceased.

Action to obtain the sale of a portion of a certain estate. The facts are related in the judgment of the Court.

*Cur. adv. vult.*

WATERMEYER, J.:—In the following judgment I may state that Mr. Justice Cloete, before whom and myself the case was heard, entirely concurs. The plaintiffs are the trustees of the insolvent estate of A. A. Jonker, which was

sequestrated in March 1862. The defendant is the executor dative of the estate of Adolf Jonker, the insolvent father, who left a testamentary disposition without an executor named therein, so that the appointment of an executor dative became necessary. The testator died in June 1862.

The testator's will was as follows :—

“ I, the undersigned Adolf Jonker, at present residing at my farm Warne Karos, situated in the field-cornetoy Swart Ruggees, district of Uitenhage, declare by these presents to have voluntarily determined to have set down in writing my last and uttermost will, which is this : That my express will and desire is that after my death the above-mentioned farm Warne Karos shall devolve for the sum of five thousand rix dollars to my under-mentioned children, to wit, Anna Margaretha, Aletta Johanna, Hester Johanna, Jacoba Christina, and Adolf Adrian Jaccobus. And if it should happen that one or more of the above-mentioned heirs wishes to make renunciation of his or her share, he or she shall be obliged to make the same to the above-mentioned heirs jointly for the sum for which he or she came into possession under the proviso, and of compensating him or her who renounces a share for all improvements, such as for buildings, &c., if there have been any, which shall be appraised by two impartial persons. This done at Warne Karos, &c., 12th day of February, 1857. Witnessed. ADOLF JONKER.”

There had been a prior mutual will of the testator and his wife dated 3rd of September, 1848, and filed after her death in January 1853. This will instituted the survivor together with the children, the same as mentioned in the will of 1857, as heirs. The wife died and her estate was liquidated in accordance with this will and the maternal portions paid to the children by the survivor. This prior will has not been revoked by the survivor, and if there had been any estate left by the survivor beyond the farm Warne Karos it would have been distributed in accordance with the terms of the unrevoked prior will. But we are told there is no property beyond this farm, and that though the testamentary writing is more in the form of a codicil, and seems rather to dispose of the farm by way of a prelegacy, it is in fact a disposition of the entire estate. But whether we regard this document

1866  
Feb. 3.

The Trustees of  
the Estate of  
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dative of  
Adolf Jonker  
deceased.

1866.  
Feb. 3.

The Trustees of  
the Estate of  
A. A. J. Jonker  
vs. The Executor  
of the Estate of  
Adolf Jonker  
deceased.

as a will or a codicil, the interpretation as to the farm is the same. It is that any one of the heirs adiating should have a fifth share in the Warne Karos on condition that if he should desire to sell he could not sell *extra familiam*, but was bound to offer it for sale to the others at the price of £75. If the father had died before this insolvency, and the son Adolf had taken under the will with the condition thereon, the insolvency then would have vested in the trustees, Adolf's right, and no more. It was argued that in such circumstances the trustee succeeding the son who took with this limitation under the will would, as such successor, take the share in the property without being bound by the condition. In the case of *Plessis vs. Smalberger* it was held where a somewhat similar condition had been imposed, that these limitations were not to be extended beyond the strict words of the disposition, and that therefore the heir of the successor would not be bound to sell *intra familiam*. But the trustee is not in this sense the successor, either universal or singular, of the insolvent. He is rather officially the procurator as well of the creditors as of the insolvent, having in his possession on their behalf the estate to be distributed according to the *judicium preferentiæ et concurrentiæ*. If after the distribution there was a surplus, that surplus would go to the insolvent in the same condition as he held it before, and if in that surplus there were contained an estate limited as this is, it would return to the insolvent in the same condition as he held it before, which could not be the case had its condition been changed and it had been free property in the trustees' hands. A sale by a trustee in insolvency must be of the same nature as a sale in execution of a writ against a defendant; and the purchaser in neither case of *necessariæ venditio* would acquire more than the insolvent had; nor could the vendor sell more. In the present instance the insolvent cannot adiate under the will because of his insolvency. The trustee on behalf of the insolvent and his creditors cannot fully take under the will; for the personal right of the insolvent to purchase from co-heirs willing to sell could not be vested in him, though the personal obligation of the insolvent to sell to the co-heirs might be transferred to him. The trustees not entitled to the share without

the condition elect not to take it subject to the condition of sale, and renounce the intended benefit to the insolvent under the will. Whatever is now taken by the insolvent must be against the will in renunciation of its provisions. The legitimate portion, would probably be more than the £75, and therefore the trustees elect to reclaim it. The plaintiffs are entitled to demand that the transfer by the executor dative to Adolf Jonker should be set aside, they electing not to take the transfer on his behalf with the condition which would require immediate sale for £75. The executor dative's transfer to A. A. Jonker, who could not accept it after his insolvency, is simply null and void as far as regards his trustees. The plaintiffs are not entitled to their first prayer that the share in Warne Karos to which the insolvent would have been entitled should be sold free of the condition imposed by the testator; but they are entitled to claim that the other heirs adiating under the will should pay the legitimate portion on a fair appraisement of the estate to them, each of these heirs then holding a fourth, and not as intended under the will, a fifth of the estate. If the remaining co-heirs cannot take the estate, paying over the legitimate, or if they cannot raise the amount of the legitimate, then the disposition must fail; and in that case, as the will cannot be carried out, the property must be sold in order that the legitimate may be received by the trustees of Adolf free of the condition imposed. There must be judgment for the plaintiffs with costs.

1886.  
Feb. 3.  
—  
The Trustees of  
the Estate of  
A. A. J. Jonker  
vs. The Executor  
dative of  
Adolf Jonker,  
deceased.

---

YORK (*Appellant*) vs. VAN DER LINGEN (*Respondent*).

*Theft.—Disposal of Money Stolen.—Third Parties.*

*When a thief who has stolen money expends it in the purchase of articles, it cannot be recovered back from the seller, unless it is clearly proved that the latter knew that it was stolen.*

Appeal from the Resident Magistrate of Murraysburg. One Jonas stole £4 from the respondent and expended it at the appellant's store. The respondent asked the appellant

1886.  
Feb. 10.  
—  
York, *Appellant*,  
vs. Van der  
Lingen,  
*Respondent*.

1866.  
Feb. 10.  
—  
York, Appellant,  
vs. Van der  
Lingen,  
Respondent.

in the Magistrate's Court to show cause why he should not repay him the money stolen by Jonas. The Magistrate gave judgment for the respondent. There was no evidence to show that the appellant knew the money spent at his store by Jonas to have been stolen ; there was every evidence that the money was paid to the appellant.

*The Attorney-General*, for the appellant.  
*De Villiers*, for the respondent.

THE COURT unanimously reversed the decision of the Court below, holding that, as there was no evidence to shew that the appellant had reason to believe that the money spent by Jonas at his store was stolen, it could not be recovered back by the respondent.

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*In re BRINK (an Insolvent).*

*Examination.—Commissioner.—Judge of Supreme Court.*

*On application a Judge of the Supreme Court took an examination quâ commissioner.*

1866.  
Feb. 17.  
—  
*In re Brink,*  
*an Insolvent.*

Motion for the appointment of a commissioner to examine the insolvent and his book-keeper.

*Cole*, for the motion, produced an affidavit of a trustee stating it was essential that the examination should take place. He proposed that one of the judges of the Court should take the examination.

BELL, J.:—It is better that if the Bar is strong enough one of that body should act as a commissioner, but as we understand that questions of importance may arise in this case, the Court think one of themselves may take the examination, and I will therefore take this examination next week.

## TRUSTEES OF PORT ELIZABETH BANK vs. OGILVIE.

*Promissory Note.—Time.—Principal Debtor.—Surety.*

*In an action on a promissory note, to which the defendant pleaded that he was a surety and not a principal debtor, and that time was given without his knowledge to the principal debtor.*

*Held,—per THE CHIEF JUSTICE,—That the evidence showed defendant was a surety, but that nothing had been done to damnify him as such, and therefore that he was liable on the note.*

*Per BELL, J.,—That defendant was not a surety, and that if he were, he had assented to an extension of time to the principal debtor.*

*Per WATERMEYER, J.,—That even if defendant were a surety, he had acquiesced in the giving of time. That unless a maker or acceptor of a note shows an agreement to constitute him a surety only, it is not open to him to allege that he was a surety only.*

Action to recover from the defendant £685 10s., with interest and costs, being the amount of a promissory note at four months made by him on 25th Feb., 1865.

1866.  
Feb. 22, 24.  
—  
Trustees of  
Port Elizabeth  
Bank vs.  
Ogilvie.

*The Attorney-General and Cole were for the plaintiffs.  
Buchanan and De Villiers were for the defendant.*

The facts were proved by evidence. These and the points relied on by the parties are noticed in the following judgments:—

**THE CHIEF JUSTICE:**—This action is brought on a promissory note, dated 25th February, 1865, whereby the defendant promised to pay Perkins, Ogilvie and Co., on order, four months after date, £685 10s. This note was, on the 2nd of March, 1865, endorsed by Perkins and Co. to the plaintiffs, who gave full value for it. It is important, in my view of this case, to point out that the note in question did not therefore fall due until the 25th of June, 1865. The defence set up by the defendant's plea is, in



1866.  
Feb. 22, 24.  
—  
Trustees of  
Port Elizabeth  
Bank vs.  
Ogilvie.

substance, that the note in question was what is well known in mercantile circles as "an accommodation note;" that the plaintiffs discounted it with a knowledge of that fact, and that the circumstances which I am now about to mention were circumstances which amounted in point of law to a release of the defendant, who, it is said, as an accommodation-maker, was a mere surety for Perkins and Co., and not a principal debtor. It is a well-known and well-established rule of law, that time given for payment to a principal debtor, without the consent or knowledge of the surety, discharges the surety; and two questions were raised on behalf of the defendant: 1st. That he was but a surety, and that this was known to the plaintiffs when they discounted the note. 2nd. That the plaintiffs gave time to the principal without the defendant's knowledge and consent, and that he was thereby altogether discharged. Although the arguments addressed to us were very much elaborated, I apprehend that the above are the two principal points upon which our decision must depend. Now, what are the circumstances proved? They may be stated shortly as follows:—About the end of March, 1865, Perkins, Ogilvie and Co., powerfully affected by the shock which overturned so many mercantile houses at Port Elizabeth, became so embarrassed that they were compelled to suspend their payments. They were at that time largely indebted to the three principal banks in Port Elizabeth, including the plaintiffs, who represent the Port Elizabeth Bank, the London and South African Bank, and the Standard Bank. Their other liabilities, both to colonial creditors and creditors in England, were also of a very formidable character. When this failure was announced, many of the creditors, and particularly the managers of the three banks I have mentioned, took active steps to arrange the affairs of the firm, and, if possible, to avoid an insolvency. On the 1st of April the banks met, and tendered, on certain contingencies, to take an assignment of the estate of the firm, and to guarantee to the creditors a first payment of 10s. in the £. On the 11th of the same month, their proposal was submitted to a meeting of the creditors, and adopted by them. It is proper to add that the defendant was not present at this

meeting. On the 5th of May articles of agreement were prepared for the purpose of carrying out the resolutions agreed to on the 11th of April. I do not think it is necessary to enter particularly into the contents of this document, but its substance was that the creditors present at the meeting of the 11th of April, being of opinion that it was desirable that the affairs of the firm should be wound up under inspection, it was witnessed that the creditors who signed the agreement, thereby granted to the firm power and authority to continue to conduct their business under the inspection and control of the managers of the three banks, in such a manner as they, the managers, should judge to be most conducive to the benefit of the creditors. Then followed a covenant that none of the creditors who signed the agreement should take any legal proceedings against the firm to recover their debts for a period of twelve calendar months; and that if they did, the agreement should operate as a release of the debt sued for. The firm then covenant to hand over all their estate and their private effects to the managers, who, in their turn, undertake to pay the creditors a *pro rata* dividend of 10s. in the £; and further to call the creditors together to decide what shall be done as to the realization of any further assets then unrealized. Then follows a clause which seems to show that it was the intention of the parties that all the principal creditors were expected to become parties to this agreement, for it is provided that the managers might pay in full any creditors refusing to come into the arrangements, provided the debt did not exceed £15. There is, however, no express clause that the agreement was to be void if all the creditors whose debts exceeded £15 should not sign. This agreement was signed by the plaintiffs, by the managers of the two other banks, and by a large number of creditors, and the managers forthwith proceeded to realize the estate and to carry into effect the trust confided to them. But before the 25th of June, the day on which this note fell due, it became quite evident that the arrangement could not be carried into effect. One large creditor in Port Elizabeth, and creditors in Europe and Cape Town, who had claims to the amount of £40,000 and upwards, had not signed the

1868.  
Feb. 22, 24.  
—  
Trustees of  
Port Elizabeth  
Bank vs.  
Ogilvie.

1868.  
Feb. 22, 24.  
—  
Trustees of  
Port Elizabeth  
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agreement. On the 16th of June the creditors, who had signed the agreement, or the greater part of them, addressed the following letter to the firm: "We, the undersigned creditors of your firm, request that you will at once place your estate in the hands of the Master of the Supreme Court. The gentlemen proposed as inspectors having refused to act, and several of your other creditors refusing to sign, leave you no alternative (to prevent the non-consenting parties obtaining an unfair advantage of the others) but to adopt the course we suggest." This letter was followed by the surrender of the estate a few days after it was received. The note now before us had not arrived at maturity until the 25th of June, I believe four days before the surrender, and I cannot perceive how the defendant was in any manner damnified or put in a worse position by anything which occurred during the period which intervened between the insolvency and the maturity of the note. For these reasons it appears to me that the defendant has not shown, in the language used in his plea, that the proceedings taken did, in law, discharge him from all liability to pay the note, to recover which this action is brought; and I am of opinion that the plaintiffs are entitled to judgment. I think it is right to say, in conclusion, with reference to the question as to whether the plaintiffs had knowledge, at the time this note was discounted, that it was an accommodation note, my opinion is that they had such knowledge. The course of dealing with notes given by the defendant in favour of the firm, the period of O'Shea's failure in 1863, when taken in connection with the peculiar mode in which the notes were from time to time discharged by debiting the account of the endorsers as they fell due would, I think, lead a jury to a conviction that the directors knew, or ought to have known, that the notes were given for the accommodation of Perkins, Ogilvie and Co. Had the case, therefore, rested upon this simple question, whether the plaintiffs had knowledge at the time they discounted the note that it was an accommodation note, my judgment would have been in favour of the defendant; but believing as I do that something more than this must be proved to constitute a defence to this action, and thinking that the defendant has failed to

satisfy the Court that the other allegations in the plea are proved, the result must be, as I have already said, that the plaintiffs must succeed.

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BELL, J., said that the ground upon which the defendant claimed exemption from liability to pay the amount of the note was that the one sued upon was one of a series of accommodation bills, known by the bank to have been such at the time they were discounted. He could not say that he was satisfied there was evidence that the bank was in possession of that knowledge at the time the notes were discounted. Perhaps a lurking suspicion might have been entertained by persons carrying on, like these directors, banking operations, and being themselves merchants in a small place, like Port Elizabeth, that the bills represented more than the real transactions between William Ogilvie and Perkins, Ogilvie and Co., and that they were accommodation notes. He did not say he did entertain such a suspicion; at the most it would be only suspicion. But, even assuming them to have had express knowledge of the nature of the transactions between the parties to the note, he did not see that that would alter the state of the case. When A. (he continued) desiring to have money, takes to C. the note of B., telling C. at the time that it is accommodation to him by B., he as much as says to C., "I desire to have money on the obligation of B., as principal debtor; will you advance it, taking the obligation as your security?" Under such an arrangement A. and B., between themselves, may hold the position of surety and principal debtor, but as between A. and B. and C. their position is not in the slightest degree altered by the knowledge of C. that there was such an arrangement, B. is not the less principal debtor to C. while only surety as between him and C., because C. knows that A. is to get the money. When the bank here advanced the money, they knew from Perkins, Ogilvie and Co. that they were in difficulties, and they advanced it upon the security of Ogilvie's note, who, to enable Perkins and Ogilvie to obtain the money, had agreed to make himself principal debtor for it. It is no doubt possible that the party giving his obligation to enable another to obtain money upon it may make with the party advancing

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the money an express agreement that, notwithstanding the form of the obligation, he would be held liable as a surety only; but without such an express contract mere knowledge by the party advancing the money that the note given is an accommodation note, cannot change the position of the party who gave the note, or of the party who advanced the money, upon the condition that though another was to get the money, the maker of the note was, by its form and in law, principal debtor. All the cases go to show that before the holder can be bound to treat the principal obligant as a surety, there must have been an express bargain between them altering the character which the note gives him. The true meaning of the letter of the bank which declined to give Perkins and Ogilvie advances upon the security of mortgages as not a proper banking transaction, but expressed a readiness "to give liberal accommodation upon good bills," can only be that though Perkins and Ogilvie were confessedly in difficulties, they would assist them with money upon bills or notes having other names than their own, the persons giving these bills or notes becoming liable as principal debtors. Therefore, to say that these were known by the bank to be accommodation bills at the time they were discounted does not advance the case of the defendant a single step, unless it be proved that the bank agreed expressly to treat these third parties as sureties. This has not been done, and the bank, therefore, is fully entitled to recover from William Ogilvie, or from Perkins and Ogilvie, in the characters they had each assumed upon the face of the notes. But even if I were mistaken upon that point, and William Ogilvie ought to be treated as surety, that would not affect the matter so far as exempting him from liability was concerned. The correspondence between William Ogilvie and Alfred Ogilvie and Perkins and Co. and the bank shows clearly that William Ogilvie was cognizant of the negotiations between Perkins, Ogilvie and Co. and their creditors as to the giving of time, and he must, by not objecting to the proposed arrangement, be held to have assented to it. But even if he were not a party cognizant of and expressly assenting to the giving of time, he must be held as impliedly assenting, because he was bound to inquire into what was

being done, and was not entitled to lie by as if he were assenting to the proposed arrangement, and then, when the convenient time came to repudiate it upon the ground of ignorance, which he, by inquiry, could have removed. But I am satisfied that he was not ignorant. If Ogilvie had really occupied the position of a surety, his assenting to the proposal to give time would have continued his liability, and if he was not a surety the case is the common one of the holder of a note against the maker for value, without a defence against payment.

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WATERMEYER, J.:—The trustees of the Port Elizabeth Bank, as the holders of a promissory note made by William Ogilvie in favour of Perkins, Ogilvie & Co. claim judgment on the note. The defendant contends that, although on the face of the note, he appears as the maker, he is not the maker of the note, because it was an accommodation note given by him to Perkins, Ogilvie & Co., and that at the time the note was discounted, that fact was known to the bank; in consequence of which his liability is only that of a surety. And he further states that the plaintiffs gave time to Perkins, Ogilvie & Co. without his knowledge, and he contends that he was thereby discharged from liability. That is substantially his defence to the action. As to the matter of fact, in the first instance, I do not consider that it has been substantiated that the plaintiffs were aware at the time they discounted this note that it was a note given by William Ogilvie for the accommodation of Perkins, Ogilvie & Co. But even if that were the case, my view of what should be the position of the Court would not be changed. I would first say that, although it seems to be laid down with tolerable unanimity in the decisions of the English courts that where you can show that the maker of a note is an accommodation-maker, and that that fact was known to the holder at the time he discounted it, the obligation of the maker becomes simply the obligation of a surety, I would not be considered as laying down that this would be the right conclusion according to our law. I am rather of opinion that where a man calls himself on the face of an instrument of this nature, a maker, or an acceptor, he

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is, to all intents and purposes a maker or acceptor, and not simply a surety, unless there have been an agreement of some kind at the time the note came into the hands of the holder, that the person calling himself on the face of it the maker or acceptor of the bill, was intended to be held liable only as surety. Without such an express agreement, I do not think that by our law any party to a bill or note is at liberty to say that his character is not that which, by his signature upon the bill or note, it appears to be. But even if it should be considered that the maker of an accommodation note, or the acceptor of an accommodation bill, is to be looked upon merely as a surety, I am yet of opinion that there is no case made out by the defendant to relieve him from his liability. It is clear that if he be a surety, time given to the principal debtor, without notice to him, and without his concurrence, would absolve him from liability. But in this case, if any portion of it on the part of the defendant has failed more prominently than another, it was the attempt to prove that there was no notice to William Ogilvie, of what was done, and that there was no acquiescence by William Ogilvie up to a certain time in what was done. In fact, what was done, was as much at his request apparently, as at the request of Perkins, Ogilvie & Co., or any other person interested in the transaction.—[After adverting to the correspondence put in, and reading several of the letters, the learned Judge continued:] The substance of these letters is distinct proof to me, that on the 1st April, William Ogilvie asked for time for himself with regard to two of these bills, one due, and the other to become due; that he knew of, and adverted to, a meeting of the creditors of Perkins, Ogilvie & Co., intended to take place on the 11th April; and with regard to that meeting of creditors, he must have known that the intention was, if possible, to give time to Perkins, Ogilvie & Co., and according to his letter to the bank on the 1st April, he approved of that intention, as likely to be beneficial both to Perkins, Ogilvie & Co., and himself. And when he admits in his letter of the 29th April, that he had in his possession a copy of the resolution of the meeting of creditors, and the deed of assignment as it is wrongly called, it is plain that he had full and complete knowledge of what was intended by

the resolutions of the creditors, and the deed of assignment; and under these circumstances he cannot be said to have been without notice of the intention to give time to these principal debtors, if they are to be so called. It is clear to me that he not only acquiesced in the intention to give time to Perkins, Ogilvie & Co., but that he thought it would be beneficial to himself as well as to them. But on the 27th May, he writes that it is not clearly set forth in the deed that all the creditors are to sign; and having discovered what might be the law if there were no sufficient notice to a surety, he thinks it may be worth while to set up this defence. The defence fails wholly, even if he be a surety; and I believe him to be principal debtor, not surety. I do not think it has been proved sufficiently that these were accommodation bills within the knowledge of the bank, although in fact and in truth they were; and under these circumstances, I can, of course, have no hesitation in concurring in the judgment of the rest of the Court.

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Judgment accordingly for the plaintiffs, with costs.

JOHNSON (*Appellant*) vs. LONG (*Respondent*).

*Signing Tickets.—Personal Responsibility.*

*The seller of tickets for a theatre who signed his own name on the tickets was held personally responsible to the buyer for the price thereof in an action for a breach of the contract.*

Appeal from the Resident Magistrate of Cape Town.

The appellant purchased from the respondent five tickets for five reserved stalls in the theatre, these tickets were signed by the respondent simpliciter. When the appellant and his party entered the theatre they found the seats occupied, and they consequently left the theatre. The appellant therefore sued the respondent for £1 5s. the price of the above-mentioned tickets.

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—  
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Long,  
Respondent.



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The Magistrate gave judgment for the respondent on the ground that the appellant should have sued the lessees of the theatre.

The buyer appealed.

*Cole* was for the appellant.

*The Attorney-General*, for the respondent, argued that as he was only the agent for the sale of the tickets, and was well known to be such, he was not personally liable in this action.

THE COURT held that the respondent, by signing his own name to the tickets without any qualification, had made himself personally responsible upon them; and that therefore the appellant was entitled to recover from him the money which he had paid for the tickets, and that the appeal must be allowed with costs.

*In re NEETHLING (an Insolvent).*

*Insolvency.—Trustee's Commission.*

*Additional interest under the name of commission cannot be properly charged by trustees.*

1866.  
Feb. 24.  
—  
In re  
Neethling, an  
Insolvent.

Motion for the confirmation of the liquidation account of the insolvent. Exception had been taken by the Master to two charges, one being for commission on advances.

*De Villiers*, for the motion.

THE COURT said, that the charge of five per cent. for commission was in reality only an attempt to charge a higher rate of interest on advances than was allowable. The commission was in reality not commission at all, but an additional

rate of interest; and such a charge could not be allowed when there already existed an item in the accounts by which the trustee was to receive his proper rate of interest. The papers were ordered to lie on the table.

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Feb. 24.  
—  
*In re*  
Northling, an  
Insolvent.

*In re HUDSON.*

*Insolvency. — Confirmation of Accounts. — Preparation of Schedules.*

*In ordinary cases the Court will allow one guinea only for the preparation of the Schedule.*

THE COURT:—In this case a charge of £3 3s. was made for preparing the schedules. The rule we lay down for future guidance is, that in ordinary cases a charge of £1 1s. shall cover the making out of the schedules. But in any case where the parties can show that there has been an extraordinary amount of trouble expended on the schedules, the Master may on proof of these facts make a further allowance to the ordinary sum. In this case we will allow the charge of £3 3s. to stand.

1866.  
Mar. 17.  
—  
*In re*  
Hudson.

EXECUTORS OF KUNHARDT *vs.* LUCAS.

*Trustee.—Writ of Execution.—Insolvent Ordinance No. 6, 1843, s. 133.*

*A writ of execution was issued against a trustee of an insolvent estate after confirmation of the liquidation account.*

Motion on behalf of certain creditors against the insolvent estate of R. Reid calling on Lucas to show cause why a writ of execution should not be issued against him in respect of the sum of £825 10s. awarded to them by him as trustee of

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—  
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the above estate in the liquidation and distribution account. The motion also asked that Lucas be ordered to pay the costs of the application personally. The trustee's account had been judicially confirmed, and notice of this application had been given for 15th February, but it was allowed to stand over in consequence of Lucas having written to say that the matter should be settled; but nothing had been done by him towards such settlement.

*The Attorney-General*, for the motion, argued that the confirmation of the liquidation account was equivalent to a judgment of the Court, and that execution could therefore be issued on it.

THE COURT said, that by sec. 113 of the Insolvent Ordinance, the Court on motion could grant relief in circumstances such as these, and that either by a writ of execution or by attaching the trustee for contempt. The Court would therefore grant the application, with costs, as prayed.

#### TAPPEN AND ANOTHER vs. INGLESBY.

*Taxation.—Witnesses' Allowance.—Engineers.—Builders.*

*On a review of the Master's taxation of costs an allowance of £1 11s. 6d. per day each was given to civil engineers, and fifteen shillings each to master-builders.*

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April 14.  
—  
Tappen and  
another vs.  
Inglesby.

Motion on behalf of the plaintiffs for an order that the Master should review his taxation of costs, on the ground that he had improperly disallowed the sum of £6 6s. to Andrews and Shepherd respectively, who were civil engineers. This was at the rate of £2 2s. per day, for attending as witnesses. The Taxing-master stated that these witnesses were in the service of the Harbour Board, and therefore should not receive remuneration as witnesses. The plaintiffs also objected to the allowance of £1 1s., instead of £2 2s., to two master-builders, respectively.

*Porter* was for the plaintiffs.

*Cole* was for the defendant.

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Tappen and  
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THE COURT fixed the allowance of the engineers at £1 11s. 6d. each, per diem, intimating at the same time that, if it had been clearly made out that these witnesses were in the employment of the Harbour Board, they would not have been entitled to any allowance, since they would have been precluded from practising on their own account. The master-builders were entitled to fifteen shillings per day each.

BURGERS AND OTHERS vs. JOUBERT AND OTHERS.

*Dutch Reformed Church.—Interdict.—Presbytery.—Consistory.*

The Synodal Commission of the Dutch Reformed Church suspended B. from being minister of the Church of H. The Supreme Court declared that suspension to be void. (a) The Presbytery of G., however, treated the suspension as being in force, and the Church of H. as vacant, and they directed K. to take charge of the parish as minister consulent, and ordered B. to withdraw from their meetings, and appointed certain persons as the consistory of the Church of H. in place of the existing consistory. B. and the original consistory then applied to the Supreme Court for an interdict to prevent K. and the new consistory from interfering in the parish of H. Held,—That such interdict should be granted, for it is sufficient ground for the issue of an interdict if any right is interfered with which will work an injury to the person applying, even if it is not of a pecuniary nature.

Motion for an interdict. The applicants were the minister and members of the consistory of the parish of Hanover, and the respondents were the minister consulent and others who

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Burgers and  
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(a) *Ante*, p. 258.

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claimed to be the *de jure* and *de facto* consistory of the above parish.

The facts and arguments are very clearly stated in the judgment of the Court.

*Porter* was for the applicants.

*The Attorney-General*, for the respondents.

The cases of the *Emperor of Austria vs. Kossuth and Day*, (a) and *The Attorney-General vs. The Sheffield Gas Consumers Company* (b), were referred to, on the point as to the legal ground for the granting of an interdict or injunction.

THE COURT gave judgment upon the application for an interdict to restrain the respondents from assuming the title and performing the functions of the consistory of the congregation of Hanover, which the applicants claimed to be.

BELL, J., said:—This is an application for an interdict, made by persons who have been duly elected members of the consistory of the Church of Hanover, and is directed against persons who claim to have been appointed to that office, in the place of and in substitution for the applicants. The application is made under these circumstances: On the 16th July, 1864, the Synodal Commission of the Dutch Reformed Church suspended the applicant, Burgers, from being minister of this Church of Hanover, upon grounds not necessary to be noticed. That judgment of suspension was brought before this Court by an action, at the instance of Burgers, to have it declared to be void upon the ground, among others, that in respect of the offences charged against him he had not been tried by the proper tribunal. This Court, by its judgment of the 30th May, 1865, declared the sentence of the Synodal Commission to be null and void, upon the ground noticed, viz. that, whereas the Synod had tried the party in the first instance, the Presbytery was the body before whom the complaint should have been tried in the first instance; the Synod—in place

(a) 2 Giffard, 628; on appeal, 30 Law Journal, Ch. 690.

(b) 22 L. J., Ch. 811; 3 De G., M. and G. 304.

of whom the Synodal Commission came—being the court of appeal, so that the party might have a trial and a rehearing upon appeal, as prescribed by the Ordinance of 1843, instead of one trial only. The Synodal Commission carried the judgment of this Court by appeal to the Privy Council (a). They did so with the leave of this Court, obtained upon a petition which stated that the Commission felt itself aggrieved by the judgment. While matters were in this position, and while the appeal is as yet undisposed of, the following proceedings, as they appear from the affidavits produced in support of this application, and in answer to it, seem to have taken place. The affidavits in support of the application are in no way denied by the affidavit of Kotze, one of the respondents, filed in answer to the application; on the contrary, they are so far confirmed by that affidavit, and on the other hand the statements in Kotze's affidavit are not disavowed by his co-respondents. We must therefore assume that the facts have happened as stated in these affidavits. These facts are that the Presbytery of Graaff-Reinet have treated the Church of Hanover, as vacant, by virtue of the suspension of Burgers under the sentence of the Synodal Commission, and have directed the respondent Kotzé to take charge of the parish as minister consulent. They did this after having previously ordered Burgers to withdraw from their meetings, although he had duly served upon them a copy of the judgment of this Court, declaring his suspension by the Synodal Commission to be void. That at meetings held in October, 1865, the Presbytery entertained charges against two of the applicants, Visser and Van Eeden, who were members of the consistory of Hanover, and deprived them of that office; the charges against them being that they had acknowledged the applicant, Burgers, to be the minister of the church, in obedience to the judgment of this Court, but in disregard of his sentence of suspension by the Synodal Commission. That the Presbytery thereafter appointed a commission to elect members for the consistory of the parish of Hanover, as if that body

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(a) See Appeal, Law Reports, 1 P. C. 362.

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were non-existent; and on the 9th November, 1865, that commission met at Hanover, and at a meeting, from which they excluded the applicants, who were the lawfully elected consistory of the parish, they appointed the respondents to be that consistory. The grounds of this proceeding we learn from the affidavit of the respondent, Kotzé, to be that Visser and Van Eeden had not been lawfully elected; because Burgers, while under suspension by the Synodal Commission, had presided over the meeting at which they were elected, and that at the meeting held on the 23rd October, 1865, at which the other applicants were elected members of the consistory, Visser and Van Eeden had attended and acted, and thereby had rendered the meeting null and void. The chief ground of objection taken by the respondents to this motion for an interdict was that the Court would not interfere by this extraordinary remedy, unless some pecuniary interest of the party making the application either had been already, or was about to be infringed. For this there is no authority either in the law of England or of this Colony. It is no doubt true that in most of the instances of interference by injunction, which have arisen in the English Law Books, the vindication of a pecuniary interest, direct or indirect, has been the matter in question; but the principles upon which the Courts of Equity in England will interfere by injunction is not restricted to the vindication of pecuniary interests only—it extends to the protection of other rights, the interference with which will work an injury to the party applying to the Court for relief. *Eden*, in his book on Injunctions, after enumerating a variety of instances in which injunction will be competent, all of them being cases of injury to pecuniary rights, concludes with these words: "These, however, are far from being all the instances in which this species of equitable interposition is obtained. It would, indeed, be difficult to name them all; for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a Court of Equity administers it by means of the writ of injunction." The law of this Colony is not different in this respect to

that of the law of England. The second requisite in an application for interdict, Van der Linden says, is a thing done "prejudicial to our right," or a thing "affecting the right" of the complainant, without any limitation or qualification as to what that right must be; and in consonance with this is the doctrine to be found in the *Censura Forensis*. In part ii. lib. 1, cap. 21, sec. 18, is the following passage: "*Cæterum in omnis generis actionibus, et causis ubi alter alteri facto aliquo præjudicium facit, aut se facturum minatur, contra jus actoris, de cujus fide ilico docere potest, pænali mandato a Provinciali Curia, ut prohibeatur peti potest, cujus tam varisæ sunt formulæ, ut viz certo numero concludi possunt, illa tamen generalis petitionis clausula omnibus communis est.*" And in Merula's 'Method of Procedure,' lib. iv. tit. 2, c. 24, there will be found instances in confirmation of this doctrine. The consistory of a church in the Dutch Reformed Church is, by the Ordinance under which that church is constituted, a body having duties to perform and rights to enforce. These are to be found in Articles 37 to 42, inclusive, of the 'Church Regulations,' and are neither few in number nor small in importance; and we can feel no doubt that the right of the members of a consistory to enjoy their office undisturbed by any one is one which this Court will protect by its interdict, upon its being sufficiently established by affidavit that the right either has been or is about to be encroached upon by persons setting up a title to the office which has no foundation in law. It would be singular if this Court could not protect the undisturbed enjoyment of such an office, when we read the nature of the duties which the consistory has to perform; for the existence of two bodies, each claiming to be the legal consistory, would be productive of the greatest inconvenience to the parishioners, and even to the other church authorities themselves. It might, in some instances, paralyse their proceedings, a danger which does not seem to have presented itself to the minds of the respondents. The affidavits in support of this application are, as was pointed out in the course of the argument upon the motion, by no means satisfactory. There is the less excuse for this, because these affidavits are of an old date, and might have been remedied by new

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ones as to the points in which they are defective. Nevertheless, we think they do disclose such a case of interference with the rights of the applicants, as will warrant this Court in interfering by interdict to prevent the respondents from in any way, as a consistory, meddling in the matters of this parish; and the application has all the requisites mentioned by Van der Linden,—a clear right in the applicants—an act done prejudicial to that right, and continuing to be done—and remediless except by injunction. Remedy by action in this case would be altogether nugatory, the duties of the office being such as must be discharged day by day. But if the defects of the affidavits were even such as to lead us to entertain a doubt as to granting the interdict asked, we could have no difficulty in at once granting it upon another ground, which was not taken by the applicants. The affidavits in support of the application, which, as before observed, are so far confirmed by the affidavit of the respondent Kotzé, and are altogether uncontradicted, either by him or by his co-respondents, disclose plainly and unmistakably that the proceedings of the Presbytery of Graaff-Reinet in appointing a commission to elect a new consistory for Hanover, and the proceedings of that commission in appointing a new consistory, were had in furtherance and prosecution of a deliberately formed purpose, not only to treat the judgment of this Court, setting aside the suspension of the applicant Burgers, as a nullity, but to punish all who might have recognised that judgment, and have acted in obedience to it. The applicant, Burgers, swears that the applicants, Visser and Van Eeden, were “reported for the alleged offences of having acknowledged deponent to be the lawful minister of Hanover, notwithstanding the sentence of suspension pronounced by the Synodal Commission, and for having, as members of the consistory of Hanover, allowed deponent to preach and administer the sacrament in the church of Hanover, when they had refused the use of the church to the Rev. Andrew Murray and others unlawfully claiming to be deputed by the Synodal Commission to take charge of the said congregation of Hanover, and that these so-called offences being declared proved, the said presbytery on the last day



of meeting," i.e. the 19th October, 1865, "proceeded to declare the said Johannes H. Visser and Piet Willem van Eeden dismissed from their offices of elders of the said congregation." This statement is confirmed by Visser and Van Eeden, who after, in their affidavit, setting forth the proceedings for their own deposition, the deposition of the other members of consistory, and the appointment of the respondents, continue: "The above proceedings were taken solely and entirely because the deponents have refused to acknowledge the validity of the sentence of suspension pronounced by the Synodal Commission of the 16th day of July, 1864, whereby the Rev. Thomas François Burgers was declared suspended from the office of the ministry, which sentence has by the judgment of the Supreme Court been declared to be null and void; but that the parties so assembled together have proceeded to declare deponents deposed professedly and openly on the ground that no force and effect attaches to the judgment of the Supreme Court, and that they cannot and will not recognize the same." These statements have neither been denied nor answered by any of the respondents. If, instead of an application for an interdict, this had been an application for an attachment against the persons of the Presbytery of Graaff-Reinet, the members of the commission, and the respondents, the new consistory appointed by that commission, we should, as at present advised and subject to what might have been said in answer to such an application, have felt little hesitation in ordering them to be attached,—the members of the presbytery certainly and such members of the commission and of the new consistory as had notice through the presbytery of the judgment of this Court. The presbytery itself had undoubted notice. It is a marvel how persons who preach peace and good-will can reconcile to their consciences deliberate rebellion against the lawfully constituted authorities of their country. There is no accounting for the lengths to which, in ecclesiastical matters, persons will allow themselves to be carried. If the judgment of this Court had in the slightest degree interfered with the doctrine or the discipline of the Church, the presbytery might have had the excuse

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made for them, that conscience required them to disobey the judgment of this Court; though we are far from admitting that, even in such a case, the excuse would have been a good one, if the case were one in which the Court, in the exercise of its proper jurisdiction, had been, unhappily for it, called upon to decide a question of doctrine and discipline, as it was admitted by the counsel for the respondents such a case might possibly occur. But in the present case no such excuse of conscience can be set up. The judgment of the Court merely found that the suspension of Burgers was void, because he had not received such a trial as the very law of the Church itself required. Two courses were open,—either to submit to the judgment and begin proceedings again before the Presbytery, or to appeal to the Privy Council. The Synodal Commission preferred the course of appeal, and they obtained the leave of this Court to appeal, upon a statement that they were aggrieved by the judgment of this Court. This they were entitled to do; and yet the presbytery, knowing that this appeal had been taken,—as we might suppose they did know,—and that the appeal had been allowed by the Court upon a statement of the subsistence of the judgment as a grievance, without awaiting the result of the appeal take the course, indecent and unbecoming in any one, but especially in a church presbytery, of treating the judgment of this Court with deliberate contempt and disregard. This Court would sit in vain for the good of the public if it could for a moment allow such proceedings to stand. We can have no hesitation in granting the interdict upon this ground, that the election of these respondents, illegal in itself, the applicants being the true consistory of the Church of Hanover, has been made in defiance and in contempt of the judgment of this Court.—Let an interdict issue in the terms asked, and let the respondents pay the costs of the application.

WATERMEYER, J., concurred.

## JOLY &amp; Co. vs. GORDON &amp; Co.

*Interdict.—Interlocutory order.—Receiver.—Terms.*

*An interlocutory order was made for an interdict to restrain dealing with goods, or in the alternative for certain things to be done such as the furnishing of a statement of goods. These things were not done, and the interdict, therefore, came into force. On an application to make the alternative terms absolute, to appoint a receiver and to grant inspection of books and documents. Held,—That, though the applicant had the advantage of the interdict previously granted, the Court would make the order required.*

Adjourned motion for an interdict.

In this case an order had been made against Gordon, trading as Gordon & Co., that “an interdict should issue to restrain him from in any way dealing with the goods of Joly & Co. in his possession, and from negotiating or appropriating to his own use any bonds, bills, or promissory notes received by him for, or on account of, goods of Toby & Co., already disposed of, such interdict to be suspended if Gordon, within twenty-four hours after the service of the order on him, supplied Mr. Ebdon (the receiver) with a statement of all goods remaining undisposed of, and a statement of all outstanding bills, or anything which in any way represents the proceeds of the goods already disposed of; that he should be at liberty to continue to dispose of the goods under the view of Ebdon until the whole were realised, paying the proceeds into a bank in the names of himself and Ebdon; that he should supply within fourteen days an account of all his transactions since the commencement of business, Ebdon to have free access to the books, either party to further apply when the account should be furnished. Gordon had not complied with the alternative terms, and the interdict became absolute. The applicant now asked that Ebdon should have inspection of the books, as it was impossible to know whether Gordon was doing anything unless the books were inspected. Gordon was the

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colonial agent of Henwood, of London, who traded as Joly & Co., by whom goods were consigned to Gordon on the terms that Gordon should remit the proceeds to Henwood, less half profits, which Gordon was to retain by way of commission. It was alleged on affidavit that Gordon was not behaving in a *bonâ fide* manner in this transaction.

*Porter*, for the applicant.

*The Attorney-General*, for Gordon, argued that as the applicant had the advantage of the interdict which Gordon had not disobeyed, it was an unusual course to grant the general relief asked by the applicant. If the applicant was not satisfied with his interlocutory security, he should proceed to obtain a final decree in a partnership action.

THE COURT made the alternative conditions of the former order absolute, adding to them an order for the possession of books, papers, and documents to be given to Ebdon and the goods in store realised under his inspection.

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— NIXDORF vs. TURVEY.

*Insolvent Ordinance No. 6, 1843, s. 124.—Civil Imprisonment.  
—Partnership.—Agency.*

*A decree of civil imprisonment was refused on a return to a writ against the personal property of a partner till the accounts were filed in the partnership liquidation.*

*Held, also, that, when the creditors agreed to a compromise, the onus of proof lay on the creditor who asked for a decree of civil imprisonment, to show that his instructions had been exceeded.*

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Nixdorf vs.  
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Motion for a decree of civil imprisonment. In 1864 the applicant obtained judgment against the firm of Turvey & Bradfield, a writ of execution was issued against the property of the firm, and there was a return of *nulla bona*. The

estate of the firm was then sequestered, and the applicant's judgment proved against it. Turvey had a private estate, not sufficient, it was alleged, at once to pay his private debts. An arrangement was made whereby he gave up a farm to the partnership creditors, and his creditors allowed him time for the liquidation of their claims against him. In this arrangement one Brown, who held a power of attorney from one Nixdorf, to prove the debt of the latter against the partnership estate, assented; nevertheless, a writ of execution against Turvey's goods and chattels was issued in 1865, the Court not being informed of the above arrangement, and a return of *nulla bona* was made. Nixdorf on this return moved for a decree of civil imprisonment. No account in the bankruptcy of Turvey & Bradfield had yet been filed, nor any distribution of assets made; but it was asserted that the probable result of a pending action would be to allow a considerable dividend for the creditors. Nixdorf asserted that Brown had no authority to assent to the arrangement above stated.

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*Cole* was for the applicant.

*Porter* was for the respondent.

THE CHIEF JUSTICE said that in his opinion the extreme measure sought for by this application should not be granted. The bankruptcy of the firm of Turvey & Bradfield extinguished the judgment previously obtained against the firm. He had no doubt also that Brown had made a claim against the firm as agent of Nixdorf. The latter had not shown that Brown was not his agent authorized to act, as it was alleged he had done, and there seemed not to be sufficient ground for the present application.

CLOETE, J., said he concurred in the view of the Chief Justice. It was sufficient to say that one great principle would be violated if this application were granted, namely, that by the statute law, as laid down in sec. 124 of the Insolvent Ordinance, a decree of civil imprisonment was not to issue as long as it was possible that anything might be obtained by the creditor from the partnership estate. Until

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the liquidation account was filed no writ of civil imprisonment could issue.

WATERMEYER, J., concurred, stating that it was for the applicant to show that Brown had exceeded the authority conferred on him.

TRUSTEES OF THE INSOLVENT ESTATE OF A. BRINK  
vs. MUNNIK.

*Insolvent Estate.—Motion.—Action.—Setting aside Proof of Debt.—Insolvent Ordinance No. 6, 1843, s. 27.*

*An action was commenced by the trustees of an insolvent estate against a creditor to set aside a proof of debt. Exception by the defendant. Held, per CLOETE and WATERMEYER, JJ., the CHIEF JUSTICE dissenting, that though by s. 27 of the Insolvent Ordinance an application to the Court by motion to set aside a proof was the more regular course, yet that this proceeding was not obligatory, and that as in this case the question must eventually be raised by an action, the proceeding by action was proper, and that the exception should be overruled.*

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Trustees of the  
Insolvent Estate  
of A. Brink vs.  
Munnik.

Exception by the defendant to the plaintiff's declaration. The defendant had proved for £571 10s. 4d. against the estate of A. Brink, an insolvent. The claim was referred to arbitration, which proved abortive, but it showed that the claim was based on an alleged partnership between the insolvent and the defendant, which was denied by the plaintiffs, the trustees of the insolvent estate, who commenced an action to set aside the proof of debt. The defendant excepted that an action was not the form of proceeding contemplated in such a case by sec. 27 of the Insolvent Ordinance.

*The Attorney-General*, for the defendant in favour of the exception, argued that the matter should first be brought before the Court on motion, which from affidavits, would be able to see whether an action was required, and to order an inquiry by the Master, or any other desirable step.

*Porter*, for the plaintiff, argued that the procedure by motion was not obligatory, the bringing of the matter to an issue before the Court was the simplest way, and was in accordance with the provision of sec. 27 of the Insolvent Ordinance.

THE CHIEF JUSTICE said that this was not an action which trustees were authorized to bring, either by sec. 50 or sec. 83 of the Insolvent Ordinance, and as this question depended entirely upon the construction to be put on sec. 27, he was of opinion that it was necessary that a person affected by any proof should come to the Court for the purpose of ascertaining in what manner the question should be raised. It seemed to him that the matter must be brought before the Court in the manner specified by sec. 27, which was calculated to diminish rather than increase expense. There appeared to be no previous decision on this point, and he was informed that this view was not altogether consistent with previous practice. But he felt bound to state that in his opinion such action could not be commenced without the intervention of the Court, and therefore that the exception should be upheld.

CLOETE, J., said that the practice, as he was well aware, had been that when a proof of debt before a Master gave rise to complaint, the Court had always insisted that the matter should be brought before the Court on motion, and notice given to the Master, the matter of complaint being set out upon affidavit. But in a case like the present, where it was necessary to go into a question of fact, he was not aware that the Court had ever inflicted on a suitor the unnecessary expense of an application, which must necessarily end in the bringing of an action. There was enough in the declaration in this case to satisfy him that the plaintiffs undertook to prove the non-existence of any partnership, and that the exception ought to fall to the

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—  
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ground. The question in dispute must be decided upon pleadings, and it was desirable that the matter should not be settled in a roundabout manner.

WATERMEYER, J., said that sec. 27 seemed to point to a proceeding by motion being the regular proceeding. But at the same time he did not think they went the length of excluding a proceeding by action. Except where it was distinctly stated that the proceeding should be by motion, but was not the case here, he was of opinion that application might be made, either by motion or action, as might be considered most convenient; and even where a motion was most convenient, he thought that what could be done by motion could also be done by action. In this case it was clear that a motion could only lead to an action.

The majority of the Court being in favour of over-ruling the objection, it was overruled accordingly, costs being costs in the cause.

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R. vs. DAVID.

*Railways Regulation Act No. 19, 1861, s. 15 (a).*

*A prisoner was indicted under Act No. 19, 1861, for having wilfully and maliciously placed an iron bolt on a railway line with intent to obstruct or upset an engine, etc. The jury found the prisoner guilty of having wilfully placed a bolt on the line, and that an engine was thereby slightly*

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(a) Sect. 15.—Any person guilty of any of the offences hereafter in this section described shall upon conviction be liable to be imprisoned and kept at hard labour for any term not exceeding 21 years, that is to say,

1. If he shall wilfully and maliciously put, place, cast or throw upon or across any railway any wood, stone, or other matter or thing; or shall wilfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway; or shall wilfully or maliciously make or show, hide, or remove any signal or light upon or near to any railway; or shall wilfully or maliciously turn, move, or direct

*injured. Held, by the Supreme Court, that under this verdict the prisoner could not be convicted under s. 15 of the Railways Regulation Act.*

*Per CLOETE, J., that the prisoner should have been indicted under s. 4 of the Railways Regulation Act.*

Motion by the Attorney-General for sentence against a prisoner named David.

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R. vs. David

The prisoner was indicted at the last criminal sessions for having wrongfully, unlawfully, wilfully and maliciously put or placed in an upright position on the Cape Town and Wellington Railway an iron bolt or pin with intent to obstruct and injure the engine, tender, carriages and trucks using the said railway.

The jury found the prisoner guilty of wilfully placing the bolt on the line, and that the ash-pan of the engine was thereby slightly injured.

*Cole*, for the prisoner, argued that sec. 15 did not apply to such a case as this, by the finding of the jury a malicious intent or an intent to upset the train had been negatived, and therefore he could only be convicted under sec. 4, under which section, however, he had not been indicted.

The *Attorney-General*, for the prosecution, argued that wilfully implied maliciously. The 15th section of the Colonial Act was similar to the Imperial Act 14 & 15 Vict. c. 19 sec. 6 (a), and under it a prisoner had been convicted for an offence similar to this *R. vs. Upton* (b). As long as mischief was intended sec. 15 applied.

*Cole*, in reply.

*Cur. adv. vult.*

any points or other machinery thereof; or do or cause to be done any other matter or thing with intent in any of the cases aforesaid to obstruct, upset, overthrow, or injure or destroy any engine, tender, carriage, or truck using such railway; or endanger the safety of any person travelling or being upon such railway, and that by so doing he had contravened sec. 15 of the Railways Regulation Act 1861, No. 19.

(a) See now 24 & 25 Vict. c. 97, s. 35. (b) 5 Cox, Cr. Cas. 298.

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THE CHIEF JUSTICE:—The indictment was necessarily framed upon the very words of the 15th section of the Act ; and it was a material and necessary part of it that the act should be alleged to have been done with intent to obstruct the engines and carriages using the railway. And it was not only necessary that that should appear on the face of the indictment, but it was a fact which must be proved at the trial to the satisfaction of the jury for the purpose of bringing the prisoner within the operation of the 15th section, which is of a highly penal character. The jury seem to me to have studiously avoided finding any intent whatever, for they state in their special verdict that the prisoner was guilty of wilfully placing the bolt on the line, and that the ash-pan of the engine was thereby slightly injured. That was a special verdict subject to the opinion of this Court. It appears to me that the jury have studiously avoided finding whether or not the act was done with intent to obstruct the engines and carriages, and, that being so, it seems to me that the conviction cannot be supported. It is quite consistent with this finding of the jury that the prisoner may have put the iron pin upon the line of the railway not with intent to obstruct the engines and carriages, but with some other intent which was perfectly innocent. For instance, he might put it there for the purpose of making a mark to fire at with his rifle, not having regard to the consequences which might happen to the engine and carriages. If a man had done that he would not be guilty of putting the iron bolt there with intent to obstruct the engine and carriages, but to afford himself a mark by which he might amuse himself. But that would be a wilful act, and for such an act he would be liable to be indicted under the 4th section of the Act, and might be convicted. But no jury would find him guilty with the intent alleged in the indictment in this case. Whether or not the jury in this case might well have found the intent alleged in the indictment is a matter peculiarly for them. But I must say if a boy of sufficient years to know the ordinary result of the act which he does, were to put on a railway an iron bolt of this kind, which was calculated to touch the ash-pan of the engine, I am quite sure he would

not be liable to be found guilty of the intent which would be the natural consequence of the act. It seems to me that he must have put it there with some object, and I can scarcely imagine any other object than to obstruct the engine and carriages. But that is a jury question entirely; and the jury have not satisfied us that they were satisfied upon it. Therefore we cannot support the conviction. If the boy had been indicted under the 4th section, the intent would not have been necessary to be proved. The section would have applied to an act of mere carelessness, as well as an act committed with a deliberate intention to upset the train. It seems to me, therefore, that the boy must be discharged.

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CLOETE, J.:—I believe this is the first case which has come before the Supreme Court in which any of the provisions of the Act of the Colonial Legislature upon this point has become a subject of consideration; I have, therefore, felt it to be my duty fully to consider the point. I confess that, looking simply at the 15th section, under which the indictment is framed, it did not appear to me that for reasons best known to the Legislature it had thought fit to make two different classes, or *species criminis* in that section. There is one class of cases, in reference to which it is said: "Any person guilty of any of the offences hereafter in this section described shall, upon conviction, be liable to be imprisoned and kept at hard labour for any term not exceeding twenty-one years." And the first subdivision is: "If he shall wilfully and maliciously put, place, cast or throw upon or across any railway any wood, stone or other matter or thing." The second and third divisions are, "Or shall wilfully or maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway." Still in the conjunctive. But the third is in the disjunctive, "Or shall wilfully or maliciously make or show, hide or remove, any signal or light upon or near to any railway." The fourth also is in the disjunctive, "Or shall wilfully or maliciously turn, move, or divert any points, or other machinery thereof, or do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid to

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obstruct, upset overthrow or injure, or destroy any engine, tender, carriage or truck using such railway, or to endanger the safety of any person travelling or being upon such railway." So that it would appear that by the first and second subdivisions of the 15th section it was intended by the Legislature that there should be two classes of cases in which it would be necessary to convict persons who "wilfully and maliciously" committed offences under the section; and that by the last two subdivisions of the section there should be certain other classes of cases, in regard to which the Legislature thought fit pointedly to make a distinction and specify that the offence should be "wilfully or maliciously" committed. Then, however, comes another difficulty. In the last three lines of the first subdivision I find used the precise words to define an offence which have already been used in the fourth section, where it is provided that, "Every person who shall wilfully do, or cause to be done, anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in and upon the same, or shall aid or assist therein, shall, being convicted thereof, be liable to be imprisoned with or without hard labour for any term not exceeding two years." It would therefore appear that in the 15th section the Legislature re-enacted, with a penalty of twenty-one years' imprisonment, what it had previously provided for in the 4th section with a penalty of two years' imprisonment. But we are bound in construing Acts of Parliament to endeavour to reconcile as much as possible apparent tautological repetitions and contradictions; and my impression, upon full consideration of the case is, that the 4th section was intended to provide for offences wilfully but not maliciously committed, such as acts of negligence which might possibly lead to injury to life or property, for which a punishment of two years' imprisonment, with or without hard labour, is prescribed, and that the 15th section, by the punishment it allows—twenty-one years' imprisonment with hard labour—is intended to apply to acts maliciously intended to do injury. Upon full consideration, I am fully of opinion that under the limited special verdict brought in by the jury, who have not exactly negatived malicious intent, but ignored intent alto-

gether, the conviction cannot be sustained. My opinion is that the prisoner should have been indicted under the 4th section, not under the 15th section. I hope this will not lead to the opinion that boys and children may amuse themselves by putting up trifling obstructions of this sort upon railways. To do that is a serious offence, and if the prisoner in this case had been indicted under the 4th section, I would have held it to be a very proper case for the infliction of the mitigated punishment provided by that section.

WATERMEYER, J.:—The jury found that the prisoner's act was a malicious act; it did not find that the act was a wilful and malicious act, with intent to cause injury. Under these circumstances, I doubted at the trial whether that could be a conviction under the 15th section, and that doubt has now been confirmed.

Conviction accordingly quashed, and the prisoner discharged.

1866.  
May 19, 24.  
R. W. David.

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*In re BARSON (an Insolvent) ex parte MOSTERT.*

*Insolvency.—Proof of Debt.—Trustee.—Insolvent Ordinance, sec. 27, Act No. 6, 1843.*

*A trustee cannot of his own motion set aside a proof of a debt admitted by the Master, or by a Resident Magistrate, but must apply to the Court by motion under sec. 27, of the Insolvent Ordinance. (a)*

Motion calling on the respondent, the trustee of the insolvent estate of N. J. A. Barson, to show cause why the liquidation and distribution account filed by him should not be amended, and the dividend be paid on a debt of £400. The short point involved arose out of the fact that the claim

1866.  
May 26.  
In re  
Barson (an Insolvent),  
ex parte  
Mostert.

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(a) See *In re A. Brink*; ante, p. 305, when the Court were divided on this point.

1866.  
May 26.

*In re*  
Barson (an In-  
solvent), ex parte  
Mostert.

in question had been admitted by the Resident Magistrate, but the trustee had set aside the proof.

*Porter*, for the applicant (the creditor), argued that it was not competent for a trustee of his own motion to disallow a claim admitted by the Master or a Magistrate. If the trustee thought the proof imperfectly admitted, he should bring the matter before the Court on motion. He referred to an unreported case of *in re Horne & Co.*, where his contention had been upheld, and also to the case of *in re A. Brink*, (a) where the Court had been equally divided.

*Buchanan*, for the respondent, stated the creditors desired to have the claim investigated, and that he had acted on these instructions. This was the simplest mode of raising the question of the propriety of this claim.

THE COURT (THE CHIEF JUSTICE, CLOETE and WATERMEYER, JJ.) unanimously held that the trustee must accept the debts proved before the Master, and could not alter or expunge the proofs of debts of his own motion. If he wished to set aside the proof, he must, under sec. 27 of the Insolvent Ordinance, bring the matter before the Court in motion.

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*In re WEST (deceased).*

*Perpetual Silence.—Claimant in Europe.*

*On an application the Court granted a decree of perpetual silence against a person in England, subject to his not bringing an action within a limited time.*

1866.  
May 26.

*In re West*  
(deceased).

Application by one Carpenter against G. West, of Capetown, personally, and as agent for his brother, J. T. West, domiciled in England. The applicant was executor of

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(a) Ante p. 305.

T. West deceased, and proceedings had been threatened against him as such executor, in consequence of the dissatisfaction of some of the family with the will of J. West. The executor desired to distribute the property.

*Porter*, for the applicant, said that the decree was to have the litigation brought on at once or finally ended.

[WATERMEYER, J.:—Have we ever granted a decree of perpetual silence against a possible claimant in Europe, because some one here, with or without his authority has made a claim on his behalf?]

G. West in person left the matter, as far as he was concerned, in the hands of the Court.

THE COURT finally made an order against both G. and J. T. West for a decree of perpetual silence, to take effect on August 31, unless before that date an action was properly commenced.

1866.  
May 26.  
—  
*In re West*  
(deceased).

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BENNETT vs. PRITCHARD.

*Provisional Sentence.—Accommodation Note.*

*Knowledge by the plaintiff that a note is for the accommodation of a third party is not ground for refusing provisional sentence against a defendant, who is prima facie liable thereon.*

Motion for provisional sentence on a promissory note for £30, made by R. H. Sherry, and accepted by the defendant.

The defence raised was, that the defendant had received no consideration for accepting the note, and that it was one for the accommodation of Sherry, which facts were known to the plaintiff.

1866.  
June 9.  
—  
Bennett vs.  
Pritchard.

*Porter*, for the plaintiff.

*De Villiers*, for the defendant.



1866.  
June 9.  
—  
Bennett vs.  
Pritchard.

THE COURT held that even assuming the facts relied on were proved, then knowledge of the plaintiff that the note was an accommodation note would not release the defendant from liability. Provisional sentence was therefore granted with costs.

**O'FLYNN vs. THE EQUITABLE FIRE INSURANCE AND TRUST COMPANY.**

**JOSEPH AND O'FLYNN vs. THE COMMERCIAL ASSURANCE COMPANY.**

*Fire Insurance.—Double Insurance.—Notice.*

*A. was the owner of premises partially insured with the C. Company, which company had a condition incorporated with policies issued by them that notice was to be given of all other insurances applying to the same property. A. subsequently in November, 1865, insured his premises with the E. Company, giving them notice at the same time that he had an insurance with the C. Company. In January, 1866, a fire took place, and subsequently A. gave notice to the C. Company of his second insurance. In an action against the two companies.*

*Held,—That, under the condition of the C. Company, notice of a subsequent insurance must be given within a reasonable time, and that two months was not a reasonable time, and therefore, that the insurance with the C. Company was avoided.*

*Held,—Also, that the E. Company were only bound to pay a rateable proportion of the damage, being the amount they would have had to pay, had not the policy with the C. Company become void.*

1866.  
June 12, 13, 14.

O'Flynn vs.  
The Equitable  
Fire Insurance  
and Trust  
Company.  
Joseph and  
O'Flynn vs.  
The Commercial  
Assurance  
Company.

Actions tried together against two insurance companies on two policies of fire insurance on a dwelling-house and furniture. The first action was brought against the Equitable Fire Insurance and Trust Company, on a policy made in

November 1865. The second action was on a policy made in 1864, with the Commercial Assurance Company, by one Joseph, and by him assigned to the plaintiff O'Flynn. The fire took place in January 1866.

The defence of the Equitable Office was that they had tendered a sufficient sum, being only bound to pay a rateable proportion of the loss as they had made the policy on the representation of the plaintiff that the premises were also insured with the Commercial Company. The defence of this company was that notice of the subsequent insurance not having been given in a reasonable time, the twelfth rule of this office made the insurance void. The twelfth rule was as follows: "Persons effecting partial assurance must give notice of all other assurance applying to the same property, and cause the same, whether previously or subsequently made, to be inserted in or endorsed on the policy; after which this Company, in case of loss, will pay a rateable proportion; but if such notice be not given the policy will be void."

1866.  
June 12, 13, 14.  
—  
O'Flynn vs.  
The Equitable  
Fire Assurance  
and Trust  
Company.  
Joseph and  
O'Flynn vs.  
The Commercial  
Assurance  
Company.

*The Attorney-General* and *Cole* were for the plaintiffs.  
*Porter* was for the defendants.

The facts of the case were proved by evidence, and counsel argued thereon.

The further facts of the case, and points at issue, appear from the following judgment.

THE CHIEF JUSTICE:—As these cases have been argued together as if they were one, it will be desirable that the judgment shall be applicable to both as if they had been separately argued. The Court has received the greatest assistance from the learned counsel who have argued the cases. They have enabled us at once to come to a decision upon points of extreme difficulty, and thereby avoided the inconvenience which would have resulted to the parties from the lapse of a long interval before the delivery of the judgment. It is the opinion of the Bench that in both cases the defendants are entitled to their verdict. I will first give my reasons for coming to that conclusion in the case in

1866.  
June 12, 13, 14.

O'Flynn vs.  
The Equitable  
Fire Assurance  
and Trust  
Company.  
Joseph and  
O'Flynn vs.  
The Commercial  
Assurance  
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which O'Flynn is plaintiff and the Equitable Assurance Company defendants. It appears that the plaintiff, in November, 1865, obtained from that office two policies of insurance, one of £500, in respect of the buildings, and another of £450, on goods consisting of household furniture and cellar furniture, and fixtures, contained in those buildings. At the bottom of the latter policy it is stated that the buildings are insured in the Commercial office for £600. These assurances having been effected, in the month of January, 1866, a fire took place under circumstances of great peculiarity; but as there is no plea upon these records raising any question as to the origin of the fire, it is not necessary to say anything upon the subject. I merely wish to say that in coming to a conclusion upon the whole case I have done so just as if it had been proved that it was a purely accidental fire. I think the Court is bound to take that view, there being no plea setting up fraud or anything of that sort as an answer to the action. Therefore, the simple question is as to the amount the plaintiff is entitled to recover upon these two insurances. Dealing first with the movable property, it appears that after investigation on the part of the office and a good deal of correspondence, the company were induced to tender a sum of £200 in respect of the damage which the plaintiff alleged he had sustained in respect of the movable property, insured for £450. It appears to me that the tender was sufficient to cover the loss which has been proved. Indeed, I think the tender of £200 was considerably larger than was necessary, under the peculiar circumstances of the case. I quite concur in the argument of the learned Attorney-General, that, *primâ facie*, when a policy has been effected, the insured is entitled to recover the amount of his policy on giving general evidence to prove a loss to that amount. But the testimony of the respectable witnesses who have been called before us, and who had an opportunity of seeing the property a very short time before the fire occurred, has satisfied me that the value of the furniture which was upon the premises at the time of the fire did not exceed £50. And with regard to the fustage, I think the value Mr. Le Seur put upon it (£120) is fully sufficient to meet the loss

sustained in respect of it. So that tender, in reality, more than covered the loss which the plaintiff has been able to prove. Then for the purpose of seeing what the plaintiff is entitled to recover in respect of the policy of £500, effected in the Equitable Office, on the buildings, it is necessary that I should at once refer to the other case in which the Commercial Marine and Trust Company are defendants. The evidence is very clear with respect to the relation subsisting between the plaintiff and the Commercial Marine Assurance Company. A policy effected by a former proprietor of the property for £750 by various assignments fell eventually into the hands of the plaintiff. And we find that when he applied to the Equitable Company to effect the insurance of the buildings for £500, he informed them that the property was insured in the Commercial Marine office for £750. That company, like all other assurance companies, has a number of conditions, which taken in connection with the policy sufficiently give notice of the terms upon which the policy is effected. I find, on looking at the rules of this office, that there is one of a very ordinary character, to this effect: [the learned Judge read the twelfth condition set out above.] Now, that is not a clause peculiar to the offices of this Colony, for the substance of it is, I believe, to be found in the regulations of every insurance office in the United Kingdom. There may be a trifling difference in the terms in which it is expressed, but the effect is the same. These offices all think it necessary for the purpose of protecting themselves from loss and fraud, to insert a clause of that sort. And I am inclined to think that such a provision is as a matter of public policy of the greatest possible use. If there were not such a clause inserted, a door would be opened for great frauds upon insurance companies. For if a man were at liberty to insure his property here, and to reinsure the same property at different offices in England and Scotland, without giving notice to each company of the other insurances, it might lead to frauds of the utmost enormity. And I have no doubt that is the reason why this clause is inserted. I think it a very reasonable condition and not subject to the objection that it is calculated to impose an unreasonable obligation on the party obtaining

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the insurance. Therefore I think that upon the ground of public policy insurance offices ought to be supported in having a provision of this sort, so well calculated to prevent fraud; and there is nothing unreasonable in it. It is admitted that when the plaintiff had effected the policy in the Equitable Office, he did not either at that time, or at any other time, until after the fire had occurred, communicate the fact of the other insurance to the Commercial Company. The learned counsel for the plaintiff admits that the meaning of the condition is, that notice shall be given within a reasonable time. I apprehend that when no specific time is stated, the question whether a reasonable time has elapsed is one that would be submitted to the jury, if a jury had to decide the case; but as in this case the parties have not thought it necessary to have the assistance of a jury, but have preferred that the Court should exercise the office of jurors as well as of administrators of the law, I am clearly of opinion that the lapse of time between the taking out of the policy and the period when Mr. Powrie for the first time informed the Commercial Company that another policy had been taken out, was not by any means a reasonable time. It was, in my opinion, most unreasonable that so long a period as two months should be allowed to elapse without notice being given; and, even then, it was not given until the fire had taken place. And on that ground, therefore, I think the Commercial Company are perfectly justified, under the very peculiar circumstances of this case, in setting up the twelfth condition as a bar to the claim. I dare say it is not in every case that the office would take up this ground of resistance to a demand, but the circumstances of this case are peculiar; and I can see no reason for finding fault with the defendants for having chosen to avail themselves of the protection afforded by the twelfth condition. Therefore, I hold, that as notice was not given to the Company within a reasonable time, the policy dropped, and the plaintiff is not entitled to recover anything whatever against the Commercial Company. That brings me back to the consideration of a point of some difficulty and nicety, as to the effect of the dropping of that policy upon the claim of the plaintiff against the Equitable Company in respect of the policy of

£500. It appears that the sum tendered by them was a rateable proportion of the loss, estimated at £700, which was considered by them a sufficient remuneration to the plaintiff for the loss of the dwelling-house. If the other policy had been kept up, the Commercial Company would have contributed £375, and the Equitable £325, the amount of their tender. It has been suggested that if the Court should be of opinion that the Commercial policy has dropped, the plaintiff will be entitled to recover from the Equitable Company the whole amount of their policy of £500. I confess that I was for some time very doubtful as to what the true position of the case was in respect to that matter. The Attorney-General argued the case with great ability; but I have come to the conclusion that the Equitable Company are entitled to be in the same position as they would have been in if the plaintiff had not, by his own act, voided the policy of the Commercial Company. The contract between the parties was that there should be an insurance for £500, subject to the condition that in case of loss the company would pay a rateable proportion of the damage. It is quite evident that when the premium was taken by the Equitable Company they were informed, and fully understood, that the Commercial Marine Company would be liable for £750 in the event of any loss occurring, and that they would be liable for only a rateable proportion. I have no doubt that companies are very much influenced in taking insurances by knowing that other companies are liable to contribute rateably. The effect is something like that of the introduction of the average clause which exists in English policies, but has not yet been introduced into our colonial policies. If the Equitable Office effected this insurance with the idea that the policy of the Commercial Marine Office, which then existed, would remain in existence, I think the conduct of the plaintiff, who by his own default, made it a nullity, obliges us to give him no more than he would have had if he had not destroyed the policy in the other office. Therefore the tender made by the defendants in this case in respect to the loss to the house will be sufficient, if we are of opinion that he would be sufficiently remunerated by receiving £700, for the purpose of restoring

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the house. I quite concur in the argument of the Attorney-General, that when loss is sustained, the party insured is entitled to be reinstated in the position in which he was before, if to do that does not cost more than the total amount of the insurance; and after some reflection I have come to the conclusion that £700 would be sufficient to reinstate the premises in the condition in which they were before the fire. The plaintiff purchased the property not very long before for £1000, which must be taken to be its value at that time. Besides the dwelling-house, there were 500 acres of land and a stable, which is not destroyed; and I dare say the materials left on the ground will greatly assist in reinstating the property. Iudeed, we have the positive evidence of Mr. Thenissen, who seemed to be a very intelligent witness, that he would have been able to rebuild the premises and put them in the same state as before the fire for £700—the very amount on which the Equitable Company tendered a rateable proportion if added to the sum which the plaintiff would have been able to recover if he had kept up his policy with the Commercial Marine Company, so as to obtain their rateable proportion. Therefore, taking into full consideration all the circumstances, and desirous as I am to dismiss from my mind any prejudice that may have been excited with respect to the conduct of the plaintiff, I think the tender was sufficient with respect to the immovable property, and with respect to the movable property, that it was more than they were called upon to pay. With these views, therefore, I am of opinion that in both cases judgment should be for the defendants, with costs.

CLOETE, J., dealing first with the case of the Commercial Marine Company, said that the entire argument in that case was one of law, and was based entirely upon the interpretation to be put upon the 12th clause of the policy. Reference to Mr. Dowdeswell's work upon fire insurance would show that the words of the condition were much more stringent than the words usually inserted in the policies of English Companies, and he believed there was some good reason for that stringency. In this Colony there were until recently very few insurance companies; but many English, Indian and

other companies advertised for business, and it struck him that the principal reason why that very stringent clause was introduced into the colonial policies was the great importance that the colonial companies should know who were their co-obligors. He thought also that on the ground of public policy there was good reason for insisting upon the observance of the condition, because without it nothing could be easier than to insure property in different offices for many times its value, get a certificate that the property insured had been destroyed by fire, and thereby defraud the insurance companies. He thought, therefore, that both upon the express terms of the condition, upon the rationale of the case, and upon the ground of public policy, it was necessary that the condition should be strictly enforced. Probably in many cases insurance companies would not insist upon such a condition; but he could not help thinking that in this case the circumstances attending the fire were so peculiar that, coupled with the extraordinary and fraudulent demand founded upon it, for the value of property alleged to have been burnt, but which was not burnt, as fully to warrant the company in availing themselves of the ground of defence afforded by the non-fulfilment of the condition. He was of opinion that the company were fully entitled to plead it, and that it was a bar to their liability. The next question that arose was, in how far were the Equitable Company liable? They had insured the property for £500, conjointly with the insurance for £650 in the Commercial; and he held that as it was by the neglect of the plaintiff that the latter policy had become due, the company were entitled to avail themselves of it as if it had stood good. Their tender was for a rateable proportion of £700. Agreeing with the Chief Justice in every other respect, he was inclined to think that the damage to the buildings could not be covered by less than £800; but the amount tendered in respect of the movable property was far in excess of the actual damage, and that excess might be set off against the deficiency of the tender on account of immovable property. However accidental the fire might have been, the plaintiff made use of it to endeavour to foist upon the company fictitious, fabricated and exaggerated accounts of the value of the articles

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destroyed. In the first list sent in, the original of which was in his own handwriting, he stated the value of the goods destroyed at £648, which he reduced afterwards to the smaller sum of £238 7s. But taking the evidence that had been given, he thought that if a tender of £150 had been made in respect of the fustage and movable property, it would have been ample. He would refrain from making any further remarks upon that part of the case except that if with the evidence that had been given, the defendants had pleaded that they were relieved from all liability in consequence of the fraudulent representations made by the plaintiff as to the extent of the damage sustained, he for one, would not have hesitated for a moment to accept the plea, and to give judgment for the defendants upon that ground. He therefore fully concurred in the judgment pronounced by the Chief Justice.

WATERMEYER, J.:—There is no doubt that it is the policy of insurance companies to deal with great liberality as regards their customers, not unnecessarily to raise any questions when losses take place, but even to pay when they are not strictly bound in law to do so. It is their policy to do so. I believe, as a rule, they act upon that policy. In the present instance the Commercial Marine Assurance Company have thought fit to say that by their contract with the plaintiff they are not bound to pay him the amount claimed from them—the amount insured by his policy with them. And for saying so they take up a technical ground. They are entitled to take up this ground in law; but I apprehend that under ordinary circumstances, although, in law, they might be entitled to take up this ground, they, acting upon the same principle as other companies, would not have done so. We are to decide whether they are justified in saying that in accordance with their contract they are not bound to pay any amount to the present plaintiff. I perfectly agree with my brethren in thinking that according to their contract they cannot be called upon to pay any amount. An insurance upon this property had subsisted for some years with this company—that is to say, there had been an annual insurance renewed from year to

year. It is clear that the 12th condition applies, and was intended to apply, to the case of a policy taken out at another office while the policy in this office was subsisting. By that condition notice was to be given. The question is when that notice was to be given? Without that notice it is clear the policy would be void. The defendants say it was to be given forthwith, or within a reasonable time after the second insurance took place. The plaintiff likewise says that the notice was to be given within a reasonable time; but that in regard to the subject matter in respect of which that notice was to be given, it could not be expected to be given until the renewal of the policy in the Commercial office, or in the case of loss; that before that time there was no reason for any notice, and therefore no reasonable notice could be given. This was very ably argued by the Attorney-General, but I think that in both of his positions as to the time and reason of the notice he is wrong; and for these reasons: The policy of insurance on the property is a policy from year to year. It is not like a policy for the entire period of life; the contract ceases at the end of each year, and is renewed at the end of each year. The section says that "Persons effecting partial assurance must give notice of all other assurances applying to the same property, and cause the same, whether previously or subsequently made, to be inserted in, or endorsed on, the policy; after which the company, in case of loss, will pay a rateable proportion, but if such notice be not given, the policy will be void." What, only, can be the meaning of "subsequently made," in regard to a policy lasting only for a year and no longer? It cannot be that notice shall only be given at the end of the year, when the contract has ceased to exist, when there may be a new contract, but when the old one is gone. "Subsequently" must mean before the end of the year, or it would mean nothing. Or in case of loss was the other argument. It is clear that the section does not mean that, for what is it? "And cause the same, whether previously or subsequently made, to be inserted in or endorsed on the policy, after which this company, in case of loss, will pay a rateable proportion." So it is plain that it could not be meant that reasonable notice should be given in case of loss, for the

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company say that after the notice shall have been given and the subsequent insurance endorsed on the policy, they will pay a rateable proportion. So that neither of these two positions will apply to that section. What else must apply but the position taken by the defendants, that within a reasonable time during the subsistence of the policy notice must be given? That reasonable time it is, for me as a juror, to inquire about, and that reasonable time, in the case of offices in Cape Town, with the parties to the insurance in Cape Town, would be within a few hours of the second policy being taken out. Reasonable time must depend upon the circumstances of each case; in this case, if twenty-four hours elapsed, it would have exceeded a reasonable time. This is the only interpretation of which I think the section is capable. I agree that if it had been ambiguous it must have been interpreted in the manner least favourable to the company, but it is not. And this being so, the Commercial Company have a defence in law to the action brought against them—a defence which I repeat is technical—a defence which they would not be, although entitled in law, justified as a public company in taking under ordinary circumstances, but which they have thought fit to take, and which I cannot say they were not justified in taking under the circumstances of this case. The case against the Equitable Assurance Company is, first, with regard to the tender, then with regard to the question whether, the Commercial policy failing, the Equitable Company are bound to pay only a rateable portion or the entire amount of their own policy. They received notice of the prior insurance, and certainly they must pay the loss against which they insured. Now, first taking the legal question, I have no doubt whatever—although it is a new question—that the plaintiff, having gone to the Equitable office, and stated to the company as a condition of the insurance, which he was bound to state, that he had a subsisting insurance upon the property with another company, he was not justified in the doing or omitting of any act immediately afterwards by which that policy with the other company would be avoided. What he stated to the Equitable was the truth; he had a subsisting policy with the Commercial, but his own hand

destroyed that policy. I do not say that there was any contract on his part with the Equitable that he should keep up the policy at the Commercial, or that he should renew it when it expired; I do not think there was. But what he did say to the Equitable was this, I have a subsisting policy; it is still running, and he gave the Equitable an opportunity of knowing if they wished what was the term of that policy. He told them he had a policy that was to run until the next October; he did not tell them that he would renew it in October. But doing something the next day, or omitting to do something by which his policy in the Commercial, instead of running to October, ceased to have any valid existence, he did give in what was an erroneous representation to the Equitable. Although he spoke truth, it was converted into falsehood on the very next day by his omitting to do that which would have kept the policy in the Commercial in a state of validity. With the Equitable he contracted that he had, and would continue to have until the month of October in the following year, a policy of insurance with the Commercial. It was ingeniously suggested that supposing the Commercial Company had become insolvent, and could not pay the loss, in what position would the Equitable have been in then? But that is not at all the same case. It would have been no act on the part of O'Flynn that would have led to that state of things. Here it is his act which falsifies his representations to the Equitable, and takes away from him the benefit of telling them there was the Commercial Insurance. Under these circumstances I concur with my brethren in thinking that the principle under which the tender of the Equitable has been made is the correct principle. As far as the tenders themselves are concerned, I must say in reference to that for the movables, that it was considerably more than the value of the movables lost by the plaintiff. I do not like to say anything more upon the manner in which the claim for damage has been attempted to be made out. On that subject sufficient has been said already, and I quite concur in it. As regards the house, I must say that the evidence of the plaintiff has satisfied me that the house could not have been reinstated for the sum upon which the Equitable tendered. I think

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that the rule is in these cases that the building should be reinstated. That does not mean that it is to be rebuilt and made new; it is to be put as nearly as possible in the same position as before the fire. I am satisfied from the professional evidence called by the plaintiff that renewing could not be done under £1100. Certainly making a fair allowance for the state in which the thatch was, and the state of neglect in which the property had been kept since Mr. Joseph left it, I should not have thought that the property could be fairly re-instated, even in the comparatively bad condition in which it was in O'Flynn's hands, for less than £1000. That would have made a difference of about £100 on the tender. But the rest of the Court consider the tender sufficient, and while I should have been disposed to have given the plaintiff something more in respect of the landed property, I should certainly have agreed with the Court in respect to costs. Although I should have felt bound to give more than the amount of the tender, the conduct of the plaintiff has been such as to compel the Equitable Company to come into Court, and to force them to doubt his representations in reference to everything which he asserted.

Judgment accordingly for the defendants, with costs.

THE CHIEF JUSTICE said that although Mr. Joseph, who was a joint plaintiff in the case against the Commercial Marine Company, must unfortunately bear his own costs, the Court thought the defendants should make no claim upon him in respect to their costs.

BURGERS *vs.* DU PLESSIS AND OTHERS (a).*Dutch Reformed Church.—Presbytery.*

*B., a minister of the Dutch Reformed Church, was deposed by the Synodical Commission. The Supreme Court decided that the decision of the Commission was invalid. The Presbytery subsequently refused B. admission to their body. Held, by the Supreme Court per CLOETE and WATERMEYER, JJ., that the action of the Presbytery was invalid, and that B. was entitled to admission as a member of the Presbytery, and to all the privileges appertaining to him as a minister of the Church.*

Action by the plaintiff as a minister of the Dutch Reformed Church.

The prayer of the declaration was as follows:—

1.—That it may be declared by the judgment of this Honourable Court, that the said plaintiff was by law entitled to sit, deliberate, and vote as a member of the Presbytery of Graaff-Reinet, at the meeting thereof, held on the 16th of October, 1865, and three following days, and that he was wrongfully and unlawfully obstructed, hindered, and prevented by the said defendants from so doing.

2.—That it may be further declared by the judgment of this Honourable Court, that, so long as the plaintiff shall continue minister of the congregation of Hanover, and so long as such congregation shall continue to belong to the Presbytery of Graaff-Reinet, the said plaintiff will be entitled to sit, deliberate, and vote as a member at the next and every succeeding meeting of the Presbytery of Graaff-Reinet, notwithstanding the sentence, or pretended sentence of the Synodical Commission, pronounced upon him upon the 16th of July, 1864, and professed to be continued on the 10th of May, 1865.

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(a) The previous decision arising out of this case will be found *ante*, pp. 218, 252.

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3.—That it may be declared, adjudged, and decreed by this Honourable Court, that all and singular the acts, resolutions, and proceedings of the said defendants, assuming to be the lawful Presbytery of Graaff-Reinet, in so far as the same were by them done or taken on the 16th, 17th, 18th, and 19th days of October, 1865, subsequent to the time when, on the 16th of the said month, the credentials of the said plaintiff, as minister of the congregation of Hanover, were in due and customary form tendered or handed in by the said plaintiff, but not recognized by the said defendants, as entitling the said plaintiff to his seat as a member—were and are null and void *ab initio*, and of no force or effect in law to any intent or purpose whatsoever.

And the said plaintiff, lastly, prays that he may have such further and other relief in the premises as to this Honourable Court shall seem meet, with costs of suit.

The defendants placed upon the record the following pleas and exceptions:—

1. That the Presbytery of Graaff-Reinet, and not the parties sued, ought to be defendants in the case.
2. That fourteen of the defendants are not, nor any of them, members of the Presbytery of Graaff-Reinet, and that no declaration of the Court made against them in the action will bind the said Presbytery; that the acts complained of by the plaintiff, so far as they were done by the defendants, or any of them, were done *bonâ fide*, and without malice, as members for the time being, and not in their individual capacities, and that they ought not, therefore, to be made defendants in the case.
3. That by virtue of the rules of the Dutch Reformed Church, the Presbytery was bound to act upon the sentence of suspension passed against the plaintiff by the Synodical Commission, and that therefore the plaintiff ought to have proceeded against the Synodical Commission to reverse or annul that sentence before proceeding with the action, or to have joined the Commission as co-defendants in it.
4. The defendants deny all the allegations of fact and conclusions of law in the plaintiff's declaration, and join issue thereon.
5. That at the time the plaintiff claimed his seat in the

Presbytery of Graaff-Reinet, he had not given security in the appeal to Her Majesty in Council, in his action against the Rev. Andrew Murray, as required by the Charter of Justice and the Rules of the Court, and that he offered no proof to the Presbytery of his having done so; and that, therefore, the Presbytery were bound to consider the judgment of the Court as being in abeyance, and the sentence of the Synodical Commission in force.

The circumstances out of which the case had arisen were as follows:—

The Synod of the Dutch Reformed Church met every five years invariably in Cape Town. In the latter end of 1862 a complaint was lodged against the present plaintiff, the Rev. Mr. Burgers, the minister of Hanover. The complaint—which was preferred by Mr. Joubert, an elder, not of the congregation of Hanover, from which congregation no complaint proceeded, but of the congregation of Colesberg—was not a complaint which affected the walk or conversation of the Rev. Mr. Burgers. It was a complaint to the effect that he was unsound in the faith. Mainly, it was a complaint that in regard to two mysterious doctrines, in reference to which much has been written, and much controversy has taken place, he had uttered in private society some expressions which would go to show that his views with respect to our Lord's human nature were pretty much those of the late Rev. Edward Irving; and he was also understood by some persons who heard the conversation to have intimated doubt, if not disbelief, of the distinct personality of the evil spirit. The meeting of the Synod, before any decision was come to in reference to the complaint against Mr. Burgers, was adjourned until October, 1863. At the adjourned meeting of the Synod, the charges against Mr. Burgers were considered, and a special commission was appointed to proceed to Hanover for the purpose of taking evidence upon the spot in regard to the complaints. The special commission was directed to report the evidence so taken to the Synodical Commission, which would meet in the early part of 1864, and take such steps on the subject as would in its judgment appear to be necessary and desirable for the welfare of the Church. The special commission took voluminous and contradictory

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evidence, which was duly submitted to the Synodical Commission, which, after examining and reading it, called upon Mr. Burgers for a distinct confession of faith on the subjects to which these complaints referred, ultimately, on the 16th July, 1864, came to a decision that Mr. Burgers was guilty of two of the charges that had been brought against him, and not guilty of the others. The two of which he was found guilty were those previously set forth; and the Synodical Commission declared Mr. Burgers suspended from the ministry of Hanover until the then next ensuing meeting of the Synodical Commission, to be held in March 1865; with the condition that if he should send into the meeting a full retractation of the erroneous opinions of which he had been found guilty, he should be restored; but that failing the sending in of that retractation, the Synodical Commission would make such further order as it might think fit. On the 30th September, 1864, Mr. Burgers, feeling dissatisfied with the sentence, and being of opinion that it had not been pronounced by a competent tribunal according to the laws of the Church, commenced an action in the Supreme Court to have it declared null and void. On the 30th of May, 1865, the Court pronounced judgment in the action, declaring, in the terms of the prayer of the plaintiff, that the sentence was null and void, and of no effect. Previously, however, to the delivery of the judgment, the Synodical Commission had held the meeting referred to in its resolution of the 16th July, 1864; but instead of suspending further proceedings against Mr. Burgers pending the decision of the Court as to the validity of the sentence against him, that reverend body thought it matter of duty, and deemed themselves called upon to ignore utterly the existence of the pending action, and inasmuch as Mr. Burgers had not sent in the retractation contemplated in the sentence of the 16th July, 1864, resolved that the suspension pronounced upon him should be continued until the next meeting of Synod, to be held in 1867. That decision was come to on the 10th of May, 1865; but the Scriba of the Synodical Commission, the Rev. Dr. Robertson, did not think it necessary to make any official communication on the subject of it to the members of the Presbytery of Graaff-Reinet, to which Presbytery the

congregation of Hanover belonged, until after the judgment of the Court on the 30th of May had become public. It was not until the 12th of June that Dr. Robertson communicated to the members of the Presbytery the decision of the Synodical Commission that the suspension of the Rev. Mr. Burgers had been continued until the then next meeting of the Synod. The Presbyteries of the Dutch Reformed Church in this Colony met annually in the month of October. At the annual meeting of the Presbytery of Graaff-Reinet, held in the month of October, 1864, immediately after the commencement of the action brought by him to set aside the sentence of suspension pronounced by the Synodical Commission, Mr. Burgess did not seek nor attempt to take his seat, because there was then against him a sentence of suspension which must be obeyed for the time being. But at the meeting of the Presbytery in October, 1865, he was in a different position. Then he was in possession of the judgment of the Supreme Court. The disqualification under which he had been placed by the sentence of the 16th of July, 1863, had passed away, that sentence having been declared null and void. He therefore proceeded, as minister of Hanover, with one of the elders of his congregation, to the meeting of the Presbytery held at Richmond in October, 1865, to take his seat as a member, and to discharge as a member the important duties which, by the Constitution of the Dutch Reformed Church, were entrusted to the administration of the Presbyters. The attorneys of Mr. Burgers caused an attested copy of the judgment of the Court, declaring the sentence of the Synodical Commission null and void, to be served upon the Præses of the Presbytery (the Rev. S. P. Naudé), and also upon the Scriba; and Mr. Burgess had also furnished himself with a similar attested copy, which he produced to the Presbytery, with his credentials as minister of Hanover. Then immediately arose the question whether Mr. Burgess and his elder were, or whether either of them was, entitled to sit, deliberate, and vote as members of the Presbytery. The consequence was that the Rev. David Ross moved, and an elder, one Izaak Stephanus Pretorius, seconded, the following long, clear, and emphatic resolution: "The Presbytery of Graaff-Reinet,

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this 16th day of October, 1865, duly met and constituted, taking into consideration that an attested copy of the judgment of the Supreme Court, in the case of the Reverend Thomas François Burgers *versus* the Reverend Andrew Murray, jun., Moderator, and the other members of the Synodical Commission, whereby the judgment of the Synodical Commission, dated the 16th day of July, 1864, suspending the said Reverend Thomas François Burgers from his office as minister of Hanover, has, on the 13th day of May, 1865, been declared to be null and void and of no effect, has been laid before the meeting of Presbytery by the President—and that the said Reverend Thomas François Burgers has laid before the Presbytery an official copy of the aforesaid judgment of the Supreme Court, as well as an official copy of the judgment of the Supreme Court, dated Wednesday, the 14th day of June, 1865, whereby leave to appeal in the aforesaid cause is granted; but, at the same time, declared that the aforesaid judgment of the 30th day of May, 1865, shall, notwithstanding, be carried into execution. And, thereupon, has declared that it is his opinion that he possesses the right to sit, to speak, and to vote in this Presbytery, as if he had never been suspended—and that this Presbytery, duly met and constituted at Graaff-Reinet on Wednesday, the 12th day of October, 1864, passed a resolution to the following effect: ‘The Presbytery, having received notice from the President that he has received a document from the Scriba of the Synodical Commission, intimating that the minister of Hanover has been suspended from the office of the ministry, is under the necessity of refusing the said minister of Hanover a seat in this Presbytery—as also that a notice received from the Scriba of the Synodical Commission, dated 12th June, 1865, has been laid on the table by the President, to the effect that the Synodical Commission had, on the 10th day of May, 1865, resolved to continue the suspension of the said Reverend Thomas François Burgers until the meeting of the General Synod, to which body the further decision of the case is referred; and further, that according to the constitution of the Dutch Reformed Church in this Colony, as founded on the Word of God, described in her rules and regulations, and confirmed

by custom, the Presbyteries are subordinate to the Synodical Commission, and bound to render obedience to the decisions of the said Synodical Commission,—After due deliberation, is of opinion, that it does not fall within the jurisdiction of this Presbytery to recognize the said Reverend Thomas François Burgers as a member of the same, and resolves accordingly not to grant to the Reverend Thomas François Burgers any right to sit or vote in, or to take any part in the proceedings of this meeting of Presbytery.’” The proceedings of the Presbytery ended in the passing of a resolution that the Præses order Mr. Burgers to withdraw, and Mr. Burgers’ consequent withdrawal; also the protest of Mr. Burgers against his expulsion, and the proceedings consequent upon it, the appointment of a minister consulent of Hanover.

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*Porter* was for the plaintiff.

*The Attorney-General*, for the defendants.

At the conclusion of the arguments of counsel the Court reserved its decision.

THE CHIEF JUSTICE, having stated the facts, proceeded:—  
I may now state shortly the reasons which induce me to consider that the defendants are entitled to judgment in this action. I regret that my brethren do not concur with me, but I think they differ, not as to principles, but as to their application to the facts of this case. This church is founded upon the establishment of three judicatures, two with an inferior and one with a superior jurisdiction, but each act or decision in the two former courts is subject to a system of appeals from the lower to the higher court, and ultimately to the highest. Now, if an elder or deacon were to attend a meeting of the Consistorial Court of the particular church after he had been duly elected, and the minister with the assistance of the majority of the elders and deacons refused to allow him to take his seat there for some alleged reason, it matters not whether good or bad, could the elder or deacon *per saltem* come to this Court and ask for our process to compel the Consistorial Court to receive him, to act, and vote? I apprehend that he could not. He would be told

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that the proper mode of getting redress would be to apply by appeal to the Presbyterial Court, within which his church was grouped. Still less would this Court listen to a prayer that all the proceedings which took place in the court after his dismissal might be declared null and void. Such an interference as this would, in my opinion, sap the very foundations on which the independence of the Dutch Reformed Church is by law founded. The reason why the elder or deacon was rejected might be because he was below the age required by Art. 12, sec. 4, or for other reasons. But those would be questions which ought to be determined in the Courts of Appeal and not by this Court. *Primá facie* every court has a right to determine the eligibility of a member to sit in it; and if by the constitution, or the rules or regulations of the community, there be provision made for an appeal by a party aggrieved to a higher court, that alone, I humbly apprehend, is the remedy which is open to the complainant. There was no want of jurisdiction in the judicatory, and if due notice of the objection, and a fair trial were given to the party, this Court would not interfere, on the principle established by Dr. Warren's case, stamped, as it now is, with the approval of the highest Court of Appeal, in *Long vs. The Bishop of Cape Town*. (a) Without, therefore, touching the other objections which were urged by the learned Attorney-General, I have, after much reflection, come to the conclusion that on the principles I have endeavoured to lay down, it was the duty of Mr. Burgers to lay his complaint of the conduct of the Presbytery of Graaff-Reinet before the Synodical Court in the first instance. It may be said that it is idle to tell Mr. Burgers this, since it was, by acting upon instructions sent by the Synodical Commission, that the Presbytery rejected his claim to sit in their court. But that circumstance does not, I apprehend, alter the state of the law on this subject, and it may be Mr. Burgers's misfortune to belong to a community which has bound him by rules and regulations which lead to such results. But, after all, there may be more wisdom in these rules than is apparent at first sight. If Mr. Burgers had

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(a) 14 Moore's P. C. Cases, 411.

appealed to the Synod against his decision for this exclusion, and the Synod had then, on hearing the appeal, set up their judgment and their opinion as to the propriety of the sentence of this Court which declared the suspension of Mr. Burgers to be null and void, then, on an application being made to us, the real and responsible parties would have been before the Court. I have every desire to uphold the authority of this Court; but I must be permitted at the same time to say that I will scrupulously respect the just privileges of others. The constitution of the Dutch Reformed Church must be respected and upheld. This Court held that the Synod had no jurisdiction to try Mr. Burgers for false doctrine, but that the Ordinance required that he should be tried first before the Presbytery. In like manner, it appears to me that by the Ordinance, wrongs inflicted on a member of the Presbytery, by the Presbytery, is a matter of appeal to the Synod, and I should be very reluctant to interfere with an intermediate court, or to order its records to be altered, when a right of appeal to a higher court could lawfully be made by the party aggrieved. Upon these grounds, therefore, without discussing the other objections raised on behalf of the defendants, I am of opinion that they are entitled to judgment.

CLOETE, J., after a few introductory remarks as to the manner in which the question at issue had been raised, went on to say:—The only point which we have thus to consider in this action is, as it appears to me, whether, by virtue of the appeal which the Synodical Commission have voted against, and are prosecuting from the judgment of this Court of the 30th May, 1865, the plaintiff in this case is prevented from exercising that right; but that he has the right to exercise the same, I cannot entertain the slightest doubt. The right of being member of the Presbytery to which the Church of Hanover belongs is a direct and immediate result of his being reinstated as the minister of that church. The sentence of the Court not only declared the so-called decree of dismissal from his office by the Synodical Commission to be null and void; but, upon the appeal to Her Majesty in Council being allowed, the Court, by its order of the 14th June,

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having expressly ordered that their sentence should be carried into execution, notwithstanding the said appeal. This the Court had the legal right to do by virtue of the 50th section of the Charter of Justice. Thus the present action is, in fact, only asking the Court to carry out or confirm its own judgments. The two grounds for defence which the defendants have set up are: First, that this action is wrongly brought, as being brought against the members, individually, who comprised the Presbytery of Richmond, whereas they maintain that it should have been directed against the body corporate of the Presbytery. This defence would have had some weight if this had been a judicial proceeding of that body, and if a decree had been passed by such a body. This action might have been directed against the whole body, although a minority might not have joined in such order or decree; but I cannot view the act here complained of in the slightest degree in the light of a judicial proceeding. It appears to me to be nothing short of an act of personal violence exercised by the majority of the members present at the meeting, forcibly expelling two of their members from taking part in any of their proceedings. But for the decency and decorum of the plaintiff, it would have resulted in an act of assault upon his person and that of his elder, and for such an act I hold every member who took part therein, aiding and abetting in this outrage, would have been viewed as a trespasser, for which they would have been personally responsible; and their conduct on this occasion has thus not the slightest semblance of a judicial proceeding. The next, and more important defence which they have set up is, that they, as members of the Presbytery, are bound to obey the directions or orders of their superiors, and that, having had an official notice that the sentence of the Synodical Commission had not been withdrawn or cancelled, they were bound to obey that command. This is therefore again, in another shape, maintaining that where there is a conflict between the civil and clerical authority, they feel bound to follow the latter, and disregard the former. This point will, no doubt, be fully argued before the Privy Council, and should Her Majesty, by her final sentence, decide that question

in favour of the appellants, in that case, we shall most respectfully and dutifully bow to that decision; but so long as that question remains undetermined, we are bound, in the due administration of justice, to lay down the plain, and (as yet) unquestioned proposition, that every subject of Her Majesty in this Colony is bound, in the first instance, to obey the laws of the country and those who are appointed to administer the same; that this Court, which owes its authority, not only to the Charter of Justice, but to the general laws of Holland, have clearly laid down that every person or body corporate resident within it, must, without exception, obey the decrees of the Court; and in this spirit the Charter of Justice in section 53 expressly charges "all governors, commanders, magistrates, 'ministers,' civil and military, and all our liege subjects within and belonging to the said Colony, that in the execution of the several powers, jurisdictions, and authorities hereby granted, made, given, or created, they be aiding, and assisting, and obedient in all things, as they will answer the contrary at their peril." I am, therefore, bound to consider the act of expulsion of the plaintiff by the defendants as an act of direct contempt of the sentence of this Court, and feel relieved by the course pursued by the plaintiff in not visiting it by any more stringent sentence than simply by declaring that the plaintiff, by virtue of the judgment of this Court of the 30th May, 1865, is entitled to exercise all the functions of a minister of the Church of Hanover, that as such he is of right entitled to act at and take part in all proceedings of the Presbytery to which he belongs, and emphatically to warn the defendants as to the consequences which will inevitably fall upon those who will pursue as that now complained of. Having thus disposed of the first and second claims made in the plaintiff's declaration, I shall next consider his third, claim, whereby he prays, "That all and singular the acts, resolutions, and proceedings of the defendants, as forming the Presbytery of Graaff-Reinet, taken during their sittings of the 16th, 17th, 18th, and 19th October, may be declared to be null and void, *ab initio*, and of no force or effect in law, to any intent or purpose whatever." The principles whereby the Court is to be guided on this question have been

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fully considered in our judgment delivered on the 13th April, 1863, in *Loedolff vs. The Synod of the Dutch Reformed Church* (a), and, in my judgment, on the authority of the Digest, and the commentator Voet, and it does not follow, as a matter of course, that because certain members in a corporate body were to be found subsequently to have been disqualified, that therefore all their proceedings would be null and void *ab initio*. From the same principles it would thus follow, that because some members of a society might be for a time unlawfully excluded, therefore all the proceedings of such a society are not to be set aside. In this case the Presbytery may have made sundry arrangements, and given sundry directions respecting some of the parishes within their circle, which would not have been affected even if the plaintiff had taken part by their resolution, such as the order to enforce collections for the mission at the sitting of the 17th October. But, on the other hand, every order or arrangement made by them, and founded upon the unlawful expulsion of the plaintiff, must be immediately affected by their having failed to recognise the plaintiff as the lawfully appointed minister of Hanover, and that consequently the resolutions passed by the Presbytery, and entered on their minutes of the last day's proceeding on the so-called first, second, and third complaints brought before and determined by them, must also be declared null and void, as directly interfering with the present judgment of this Court, and more particularly their order or resolution dismissing Johannes H. Visser and P. W. Eede as elders, and Christian Rabe and Hendrik Potgieter as deacons, with forfeiture of their rights and privileges, for having allowed the plaintiff to officiate as minister at Hanover, these should be declared "null and void." After what has been stated by the Chief Justice, I only think it necessary to add that I quite concur in the expression that the Court should and will always avoid intermeddling with any questions of the Dutch Reformed or any other church, involving merely abstract principles

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(a) This case does not appear in the collection from which these reports are drawn up.

of doctrine or discipline. It is only when a suitor comes before the Court and complains that his civil rights have been assailed or prejudiced that the Court is compelled to interfere. That this Court has invariably followed this course is manifest by a reference to the cases of *Loedolff vs. The Synod of the Dutch Church, of Long vs. The Bishop of Cape Town*, (a) and in the more recent cases of *Kotzé* and of the present plaintiff against the Synod or Synodical Commission of the Dutch Reformed Church (b). In all these cases the Court has only inquired whether the parties felt aggrieved by the defendants exercising powers which they did not by law possess; and in the present case in particular, the Court has merely held that the defendants in the original suit had usurped a power which was not granted them by the very spirit of the Ordinance from which they derived their authority, and from which alone they can claim any jurisdiction over the persons belonging to that Church. On these several grounds, my judgment is that the plaintiff, as minister of the Church of Hanover, is entitled to represent that parish at the meetings to be held by the presbytery to which that church belongs, and that the defendants be, and they are hereby, directed to allow both the appellant and the elders and deacons just mentioned to have their seats at the Presbytery, and further ordering the defendants collectively, in so far as they concurred and voted in the expulsion of the plaintiff and the members who accompanied him, as representing the Church of Hanover, be condemned in the costs of this suit.

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CLOETE, J., then read the judgment which had been prepared by Watermeyer, J. After detailing the circumstances out of which the action had arisen, he proceeded:— Upon these facts the plaintiff in his declaration claims no damages, but prays that it may be declared by judgment of this Court that he was “entitled to sit, deliberate, and vote as a member of the Presbytery of Graaff-Reinet at its meeting in October, 1865, and the following days, and that he was wrongfully and unlawfully obstructed,

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(a) 11 Moore P. C. 411.

(b) *Ante*, 258, 351.

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hindered, and prevented by the defendants from so doing." I can have no hesitation in granting this prayer. It is a necessary consequence of the judgments of this Court of the 30th of May, 1865, and the 12th April, 1866, in which latter judgment, in fact, the plaintiff's right to the seat is distinctly stated. He is at present the minister of Hanover, and by the law of the Church a member of the Presbytery of Graaff-Reinet. The second prayer, that it may be declared that as long as he shall continue minister of Hanover, and so long as such congregation shall continue to belong to the Presbytery of Graaff-Reinet, the plaintiff shall be entitled to deliberate and vote at the next and every succeeding meeting of the Presbytery, notwithstanding the pretended sentence of the Synodical Commission, is likewise one which I unhesitatingly think ought to be granted. And I have as little doubt about the right of the plaintiff to the affirmation, to a certain extent, of his third prayer, that the acts and proceedings of the defendants assuming to be the lawful Presbytery of Graaff-Reinet, and in so far as the same were by them done or taken on the 16th, 17th, and 18th October, 1865, subsequent to the time when the credentials of the plaintiff were in due and customary form tendered but not recognized by the defendants, are null and void *ab initio*, and of no force or effect in law, in as far, at least, as they affect the plaintiff or the parish of Hanover, of which he is the minister. Beyond this it is not necessary to go in the present case. Having arrived at these conclusions, I would only add that in no opinion do I concur more heartily than in that which yields to the Dutch Reformed Church the fullest liberty of action in regard to doctrine and discipline within its own regulations. The rule in Dr. Warren's case, cited with approbation in the judgment of the Privy Council in *Long vs. The Bishop of Cape Town* (a), is one to which I would adhere in the most unqualified manner. It was because the Court was of opinion that the authorities of the church had departed, in what was called the trial of the plaintiff, from the rules which equally bound him and them, that the proceedings by which he was suspended were

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(a) 11 Moore P. C. 411.

declared null and void. It was because the Presbytery of Hanover in October, last year, acting by the direction of the Synodical Commission, whose proceedings had been declared null, considered it their duty to acknowledge and act upon the validity of what had by the Court been so declared null, that the interdict of April became necessary. It is because the majority of this Presbytery on this occasion persisted in excluding the minister of Hanover from acts and deliberations, to participation in which the Court had held that he was as fully entitled as any one of them, that he was justified in seeking the declaration of his rights, as far as the defendants are concerned, from the Court. If there were in the proceedings of the Presbytery in October, 1865, anything in the nature of a judicial trial by which the plaintiff was excluded, I could understand the argument, that he should appeal to the Church Court immediately superior to the Presbytery, and should not have come to this Court. But the Presbytery fairly do not affect that there was any such proceeding. They, as an inferior authority, obeyed their superior authority. We now declare to them (the inferior authority) what we have already declared to the superior authority; and, in addition, that their acts in October, 1865, in as far as they affect the plaintiff in this parish, are a nullity. In these proceedings it appears to me that the Court is bound to uphold the liberties and privileges of the Dutch Reformed Church, in accordance with its charter of 1843, against the breach by a majority of its own laws. Much has been said from time to time since these questions relating to the plaintiff's position have come into Court, of the spiritual independence of the Dutch Reformed Church, and strong appeals were made to the history of Presbyterianism. I mentioned on a former occasion that the Church could scarcely be considered to possess a history in this Colony until 1843, when the liberality of the Legislature relieved it, most fitly, from the thralldom in which it had been kept even by De Mist's Church order, by which its liberties had been much increased, I have since found what I had for some time mislaid, the instructions for ministers of the Dutch Reformed Church proceeding from Holland to the colonies subject to the

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Dutch East India Company, and signed by them before leaving Holland. It is from the 2nd vol. of the 'Verhaal van de Holl. O. I. Compagnie,' and the 12th section, page 516, is of the following tenor (the prior sections having fixed the nature of the contract, &c.): "With the condition, nevertheless, that it shall always be in the power of the directors to recall the clergymen and catechists (*nieken-troosters*) without being bound to give any reason for such recall: as in like manner the Governor-General and the Councillors of India shall have it in their power to send them back, and decline their future service, as they shall find to be fitting in the interest of the company's peace and the edification of the Church in India." This being a subordinate Indian Government, the same rule applied here. From this humiliating position the Ordinance of De Mist did much to raise the Church in this Colony, and the work was completed when the Ordinance of 1843 gave it full freedom, gave legislative sanction to a code of laws and regulations, framed by its own authorities, and appended to the Ordinance; gave power to amend these laws and regulations when it might appear necessary, in accordance with the Ordinance—a power more than once exercised; and recognised its authority distinctly within itself to entertain and settle in its proper judicatories all questions of doctrine and discipline. There is but one condition attached to the enjoyment of these powers and privileges, and that is, that the Church shall respect its own laws. This does not seem a hard condition; it is one imposed on all associations of this nature in regard to the members of such associations. It is an obligation imposed on all parties who contract with each other, and thus make a law from which, without consent, they cannot resile. The strongest safeguard of the liberty so dear to the Church—the freedom from secular interference in spiritual matters, which it rightfully claims, but, I believe, in a wrong way—is a strict adherence to its own rules and regulations, at its own request embodied in the statute book, and by itself amended from time to time in accordance with the law.

**HULL vs. JOSEPH McMASTER AND THE SOUTH AFRICAN  
MORTGAGE AND INVESTMENT COMPANY (LIMITED).**

*Children.—Tacit Hypothek.—Act No. 5, 1861, s. 3.*

*Two major children, absent from the Colony, and three minor children, were held entitled to a tacit hypothek on shares in Colonial Companies in respect of the property of their mother married in community of property to their father, which shares were claimed by the defendants, who had agreed to liquidate the debts of the children's father in consideration of the assignment to them of certain assets, which proved to be insufficient to balance the debts.*

Action by the plaintiff, as attorney of the three major children and tutor dative of the three minor children of Joseph McMaster, for a declaration that such children were entitled to a sum of £10,459 15s. 3½d., half the value of the estate of the late wife of J. McMaster, and that they had in respect of such sum a tacit hypothek upon the whole of the property of McMaster, that certain shares might be declared executable, that a previous order of the Court restraining their transfer might be set aside, and that they might be dealt with as though they were the property of the children. The facts of the case were that in 1863 Mr. McMaster's firm was in difficulties, and he came out from England to arrange his affairs. He applied to the South African Mortgage and Investment Company to assist him, and the result was that they agreed to liquidate his debts on certain property stated in a schedule being assigned to them. But in fact the claims proved to be greater and the assets less than the Company had been led to suppose. They therefore obtained an order for the arrest, to secure some part of their debt, of certain shares in several Colonial Companies, the present value of which was admitted to be £6,260. The children of McMaster then put in a claim on these shares, such claims never having before been brought to the notice of the company. The claim was based on the fact that

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McMaster married in the Colony in 1835 without an antenuptial contract, that community of property between himself and his wife was thereby created, that that community was dissolved by the death of the wife in 1850, that the joint estate amounted then to £20,900 in value, and that consequently the children had a tacit hypothek on all their father's property in respect of their portion of their mother's estate.

*Cole*, for the plaintiff, admitted as regarded the claim of the eldest son, that his claim was invalid, as he was of age, and had lived in the Colony since he attained his majority. As to two of the other five children, they were daughters who were married, but they had not resided in the Colony since marriage or majority, and five years from that time had not elapsed, and therefore their claim was good, as was that of the three minor children. He referred to *Vost*, 20, 2, 11, and Act No. 5, 1861, sec. 3.

*Porter*, for the Mortgage Company, argued, firstly, that the ~~sums~~ stated in regard to the property were not correct; secondly, ~~that~~ there could not be a tacit hypothek, except in the case of an insolvent's estate, which was not the case here, and that a tacit hypothek ~~was~~ equivalent to a conventional general mortgage, and in respect of it ~~there could~~ not be a specific heir on movables. He also addressed an argument to the Court on the assumption that McMaster had become domiciled in England, but as the Court negatived this assumption, it is unnecessary to state the arguments of counsel on this point.

*Cole*, in reply, argued *inter alia* that in equity the children, who were unprotected in the transactions with the company, had a right to be preferred to the company.

*Buchanan*, for McMaster, did not argue.

THE CHIEF JUSTICE:—In this case the plaintiff in his capacity as the tutor dative of three minor children of the first defendant, Joseph McMaster, and as the agent of three other children, prays to have the rights of the respective parties represented by him declared in regard to certain matters set forth in the declaration, and he also prays to

have a certain interdict set aside. The declaration states that the said McMaster was married in this Colony in community of property to one Sarah White, who died in Graham's Town on the 24th of November, 1850, and that the children respectively represented by the plaintiff are the children of the said marriage. It is then alleged that immediately after the death of his wife the said McMaster caused an inventory to be made of the joint estate of himself and his wife as the same existed at the time of her decease, and that, thereupon, Sarah White having died intestate, the various parties represented by the plaintiff became entitled, as the heirs *ab intestator* of their mother, to one half of the said joint estate; that the said McMaster did not pay over to his children, as such heirs as aforesaid, but took possession of the whole of the said joint estate. It is then alleged that there are now in the plaintiff's hands and custody certain certificates of shares in joint stock companies, and registered in the name of the said McMaster; that the defendants, the South African Mortgage and Investment Company, have obtained from this Court an order restraining the registration of any transfer of the said shares to the said McMaster or any other person, on the ground that the defendants have unsecured and unsatisfied claims against the said McMaster to an amount exceeding the value of the shares. The declaration then alleges that the three minor children have a tacit hypothek for the amount of their maternal inheritance, and that such tacit hypothek constitutes a prior and preferent claim above the claim of the defendants, which is not a liquid claim, nor founded upon any debt of the said McMaster incurred to them prior to 1863; and in like manner the other children, although they have attained the age of twenty-one years, are entitled to a like tacit hypothek, as they have never, since attaining the same age, come within the jurisdiction of this Court; wherefore the plaintiff prays that it may be declared that the said children are entitled to the moiety of the said joint estate, and that they have in respect of it a tacit hypothek upon the whole property of the said McMaster; and, further, that the said shares may be declared to be executable for the purpose of satisfying the claims of the said children, and that the

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interdict may be removed, and plaintiff entitled to deal with the said shares as if they were the property of the said children represented by him. The defendants, the South African Mortgage Company, after averring that the defendant McMaster was indebted to them for a large sum of money, pleaded the general issue. The facts proved before us disclosed some transactions highly discreditable to the character of the defendant McMaster, who, in the latter part of 1863, induced the London and South African Mortgage and Investment Company, at their office in Port Elizabeth, to advance him many thousands of pounds to liquidate his debts in this Colony, and by a deed of agreement, bearing date the 4th of August, 1863, he purported to sign over to the company assets belonging to him, which he stated were more than sufficient to cover any advances that might be made on his account by the company. The company, on the faith of this arrangement, proceeded to undertake the obligation; but they soon discovered that the assets of McMaster were wholly insufficient to meet the advances made; and even if they could have realised the whole of the assets, they would have incurred a very heavy loss—so heavy that the company have not been anxious, in the course of the discussion of this case, to exaggerate. When the company were thus the creditors of McMaster, a claim was unexpectedly set up by the plaintiff on the part of McMaster's children; this claim is expanded and explained in the declaration, and if it proves successful, the company will be compelled to allow McMaster's children to receive the value of certain shares in banks established in this Colony, and which the company believed to be a part of McMaster's assets, on the ground that the children hold a tacit hypothecation in respect of their mother's inheritance. I am compelled to say that McMaster, in his dealings with the company, made no mention whatever of the claims which he well knew the children had upon his estate in respect of their mother's portion, for he deposed when examined in London before a Commission of this Court, that he caused an account to be made up a short time after 1850, when his wife died, for the purpose of filing it with the Master of this Court. This account showed that at the time of his wife's death the joint estate was worth about £20,000;

and as he had married in the Colony in community, he ought at that time, when he made out the account, to have paid the half of the same into the hands of the Master of this Court in trust for his six minor children then living under his guardianship. Thus McMaster wilfully disobeyed the law of the Colony in 1850, when his wife died, and he was guilty of the grossest fraud and dissimulation in withholding all mention of their claim when he sent in his list of liabilities to the company, who, with more liberality than prudence, undertook to pay his debts in the Colony in 1863 to enable him to leave it. Acts like these must be repudiated and exposed when they come to the knowledge of the authorities, whose province it is to denounce all frauds and deceptions when they are brought to light. But feelings of indignation and reprobation as to the conduct of a father must not disturb the mind of the judge when the legal rights of children are properly brought to his notice. If the children, all minors in 1850 when their mother died, and three of them minors still, can prove to the satisfaction of the Court that they or some of them are entitled to the tacit hypothecation known to our law, it is the duty of this Court to award it. McMaster, no doubt, by using their mother's fortune, was enabled to push the fortunes of his children in the world, and he says that he made a settlement upon one of them on her marriage, but he does not give any further particulars on that subject; and no use has been made of the admission by the company, the real defendants in this action. But I may say on the other hand that the claim of these children ought to be strictly examined and clearly proved. The company would have been justified if they had, with the utmost strictness, required positive proof that McMaster was worth £20,000 in 1850. His own declaration on that subject was, to my mind, worthless; and had not other evidence than his been produced, the claim of the children must have failed altogether. But credible evidence was not wanting, and as the exact sum was immaterial, I understand the counsel for the company to admit that he was satisfied that the joint estate was of the value at the time of the death of the wife of at least £15,000. That a tacit hypothek exists in this Colony in respect of the portions to which children

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are entitled out of a joint estate has never been questioned; and a late statute, 1861, to which I shall presently more particularly refer, regulates the period during which such tacit hypothecation may be enforced. In this case it might have been a matter of great importance to have ascertained the past and present domicile of the defendant McMaster. The evidence on that point is singularly obscure. Whether he was originally an Englishman, a Scotchman, or a subject of some other country nowhere appears. He says in his evidence that "he came to this Colony with his father 36 or 38 years ago; that he returned to England from the Cape in 1852 on a visit; my children came with me to England in 1852, they lived with me in England; I remained in England until 1853, when I returned to the Cape, which I finally quitted in 1854; I returned again to the Cape in 1862." It does not even appear distinctly whether he ever gained a domicile here, or whether he abandoned that domicile, if acquired and obtained, some other. All is left in doubt and uncertainty. Under these circumstances I think that McMaster must be taken, in the absence of all proof to the contrary, to have been a natural born subject of the United Kingdom when he came to the Colony with his father, and he was a subject therefore to the proclamation promulgated in July, 1822, by Lord Charles Somerset. McMaster therefore lost by the express words of this proclamation the power of devising his estate according to the English law. He married in community in the Colony without any anti-nuptial contract, and his wife having subsequently died intestate, the rights of the children to have the property administered and divided according to Colonial law clearly arose, whatever might be the domicile of McMaster at the time of the decease of his wife. Then, as I have already said, a tacit hypothek existed in respect of the claims of the children. The next question is, whether these children then, who are represented by the plaintiff, lost their right to insist on their claims? To answer that inquiry, it is necessary in my view of the case, to consider the effect of the 3rd Sec. of the Act, No. 5, 1861.

His LORDSHIP read this, and continued:—

Now plaintiff the represents the six children of McMaster.

Joseph Alexander, the eldest, is clearly barred by the statute. He remained more than three years in the Colony after he had become of age, and his claim was very properly abandoned by the learned counsel for the plaintiff. Sarah became of age in 1862, when she was absent from the Colony; Laura, in 1864, also when she was absent; and neither of these two have ever returned to the Colony since they became of age. It appears to me that these two children, not having returned to the Colony since they became of age, are not entitled at present to assert their rights of tacit hypothecation claimed in this suit. The suit is barred after three years from the attaining of majority; and if at the time the majority is attained, the parties are absent from the Colony, their right of enforcing the tacit hypothecation remains in abeyance until they return to the Colony, and the claim may be enforced during a period of three years from the date of the return. As these two last-mentioned children have not returned, I do not see how the present claim in respect to their rights can be maintained. It may be said that the last proviso in the section as to the limitation of five years will allow this action to be brought. But I do not read the clause in that way. As both my brother judges are of opinion that notwithstanding this statute all the children except Joseph are entitled to the relief sought in this action, I do not think it is necessary to ask the learned counsel for the plaintiff to argue the point I have suggested with respect to the effect of the statute on the claim of Sarah and Laura. It may be that as to Laura, she might have the benefit of the first clause in the section which gives minors three years to bring their claims after the time of their majority, and as she became of age in November, 1864, she would have had until November, 1867, to bring her claim. But as to Sarah, who became of age in October, 1862, she would clearly be entitled to return to the Colony before her claim to hypothek arises if my reading of the statute be correct. We heard a very able and learned argument on the assumption that McMaster had acquired a domicile in England, but I can see no proof of that fact; and it is in my opinion unnecessary to discuss that question. According to my view the tacit hypothek exists so far as the

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three minor children are interested; and as the majority of the Court think that Sarah and Laura are also entitled to succeed, our judgment must be in favour of the claims of these parties also.

The other judges concurred.

Judgment accordingly for the plaintiff, with costs against McMaster, or in default of payment by him, out of the fund. On a subsequent day, the Court made an order for the sale of the shares, and granted the plaintiff five per cent. commission on the shares of the minors, but made no order as to the commission in respect of the shares of the other children.

#### LAUBSCHER vs. REVE AND OTHERS.

##### *Servitude.—Cattle Track.—Watering-place.*

*In an action to define a servitude it was proved that a spot marked in the diagram to a grant was not the place where cattle from the dominant tenement had been in the habit of drinking. Held,—That, the owner of the dominant tenement was not bound by the erroneous diagram.*

*In regulating the width of the cattle track, it having been proved that the dominant tenement could depasture from 300 to 400 cattle: Held,—That a track 150 yards wide was sufficient.*

*Held, also, that three hours' time should be allowed for the cattle to rest at the river, and that cattle pasturing on the dominant tenement, but not the property of the owner, could be driven to the water.*

1886.  
June 16, 21.

Laubscher vs.  
Reve and  
others.

Action to define a servitude. The plaintiff was the owner of the farm Kleinberg, which had a right of way for cattle over an intervening farm to the Berg River. The facts of the case are concisely stated in the judgment of the Court.

*Cur. adv. vult.*

THE CHIEF JUSTICE said that by a Government grant, dated in 1831, the parties now represented by the plaintiff became possessed of the estate Kleinberg, and by a similar grant the defendants, or the parties whom they represented, took the adjoining farm—Oliphant's Kraal. In the latter grant there was a reservation in favour of the farm Kleinberg that the cattle subsisting on that farm should be allowed to go to and fro across the farm Oliphant's Kraal to Poeskop Drift, on the Berg River, by a route marked on the diagram. Similar words occurred also in the grant of the farm Kleinberg. The exercise by the plaintiff of this servitude led to disputes between himself and Reve, and a few months ago the latter, who objected to the cattle coming to drink at their accustomed place, to assert his rights, impounded 200 cattle of the plaintiff. The plaintiff then commenced his action, which raised four questions. The first was, at what place the cattle were to drink in the river; the second, as to the width of the track over which the cattle were to pass to or from the river. The third had reference to the length of time the cattle should rest at the river; and the fourth was whether the right of the plaintiff to drive cattle over the lands of the defendants extended to cattle not belonging to the farm Kleinberg, but sent thereon to pasture. With regard to the first point, the misunderstanding seemed to have arisen in consequence of some carelessness or neglect in preparing the diagram annexed to the grant of Oliphant's Kraal. The line drawn on it did not exactly indicate the place where the cattle had been accustomed to drink. But the parties were not bound by an error on the part of the surveyor, who proved by his evidence that he intended the line to indicate a place called Poeskop Drift. The defendant was mistaken in supposing he could oblige the plaintiff to send the cattle to a place other than the usual one because it was placed on the diagram, and therefore the plaintiff was entitled to judgment on the first point. The second point was an important one, though it was difficult to lay down any general rule in regard to it. The width of the road necessary for the convenient occupation and enjoyment of such a servitude must depend much on the number of cattle to be driven over it. In this case

1866.  
June 16, 21.  
Laubscher vs.  
Reve and  
others.

1868.  
June 16, 21.  
—  
Laubscher vs.  
Reve and  
others.

the dominant tenement could support many cattle, and the Court must, therefore, define a road sufficient for the purpose of driving many cattle over it. The Court thought that if a road 150 yards wide were defined it would be sufficient. Yet it must not be inferred that in every case the Court would consider this width as sufficient, since it must depend on the number of cattle which the dominant tenement could support, and in this case that number was from three to four hundred. If the parties would agree to enclose a road, one of less width would be sufficient. As to the third point, the cattle had to come a very considerable distance, and they should have a reasonable time to rest; the Court was of opinion that the limit of time should be three hours. As to the fourth point, the Court was clearly of opinion that all cattle pasturing on the plaintiff's farm were entitled to the river for water. Therefore the plaintiff was entitled to judgment.

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*In re SPALDING.*

*Ship.—Master.—Removal.—Jurisdiction.*

*The Court has jurisdiction to entertain an application to remove a master from command of a ship.*

1868.  
July 10.  
—  
*In re Spalding.*

Application to make absolute a rule calling on one T. Spalding, the late master of the schooner *Flora*, to show cause why he should not be removed from the vessel, be interdicted from proceeding on board of her again, and why he should not surrender the command to the recently appointed master.

It is unnecessary to mention the facts of the case, which was eventually compromised; an important preliminary point was raised, viz. that the Court had not jurisdiction to entertain the application.

*Cole*, for the master, in objection to the jurisdiction, argued that no court except one having admiralty jurisdiction, which this did not possess, could exercise this jurisdiction. He referred to 17 & 18 Vict., c. 104, s. 240.

*The Attorney-General*, for the owner, argued that this was part of the ordinary jurisdiction of the Court, and further, that as the master had been *de jure* removed from his command by order of the owner, the Court could interdict the master from remaining on board.

1866.  
July 16.  
*In re Spalding.*

BELL, J.:—Where a court has jurisdiction it cannot be taken away except by express words. The Statute certainly does not directly alter the common law right of a shipowner to interfere with his servant, and the Court, before the passing of the Merchant Shipping Act, clearly had jurisdiction to assist the owner in the exercise of his common law rights. The jurisdiction not being expressly taken away, we hold that this application is properly made to this Court.

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IN THE GOODS OF J. ROBINSON.

*Will.—Outlying Settlement.*

*A will, witnessed in accordance with English law in King William's Town before the issue of the British Kaffrarian Letters Patent, was held entitled to letters of administration.*

Motion for an order directing the Master to issue Letters of Administration on a will made by J. Robinson, deceased, at King William's Town, on August 13, 1859. The will was duly witnessed in accordance with English law, but was not signed on every leaf in accordance with the law of the Cape of Good Hope. Letters Patent constituting British Kaffraria a part of the Colony were not issued till 1860.

1866.  
July 28.  
*In the Goods of  
J. Robinson.*

*Porter*, for the motion, argued that the English law must be taken to have prevailed in the place where the will was executed at time of its execution.

THE COURT held that the will was duly witnessed, and ordered Letters of Administration to issue.



## LE ROUX vs. DE VILLIERS.

*Provisional Sentence.—Cession.*1866.  
Aug. 1.Le Roux vs. De  
Villiers.

See this case reported 2 Buchanan, 90.

THE COMMISSIONERS OF THE MUNICIPALITY OF CAPE TOWN  
vs. TRUTER.*Sale.—Market Regulations of Cape Town, Nos. 12 & 16.—  
Non-completion of Purchase.*

*A. purchased a load of oat-sheaves in Cape Town market, but before removing it he found that in the inner part there were a number of wild oats, and he refused to pay for the same. The oats were not sold with a warranty as to quality. Held,—per THE CHIEF JUSTICE and CLOETE, J., dissentiente WATERMEYER, J.,—That A. was bound to take the oats. Semble, that there should have been a reference under R. 12 to the market-master.*

1866.  
Aug. 9.The Commis-  
sioners of the  
Municipality of  
Cape Town vs.  
Truter.

Appeal from a decision of the Resident Magistrate of Cape Town.

Truter purchased in Cape Town market a load of oat-sheaves, and subsequently found that inside the load there was a number of wild oats, which could not be seen till the waggon was unloaded. The sale was unconditional, and Truter could examine the load as much as he liked. Truter refused to complete the purchase, and as the Commissioners considered that he was bound to take the oats, they ordered them to be stored at the Town-house, and sued him for the price of the load. The Resident Magistrate gave judgment for the defendant, and the plaintiffs appealed.

*Porter*, for the appellants, argued that unless a purchaser had an actual warranty with the goods, he bought at his own risk. He quoted the sixteenth of the market regulations: "The purchaser must make himself acquainted with the

quality of articles, and must make immediate payment without deduction or delay."

*The Attorney-General*, for the respondents, argued that the case was not one of warranty. There was fraud in the transaction, and such being the case the purchaser was not bound to complete the bargain.

1866.  
Aug. 9.

The Commissioners of the  
Municipality of  
Cape Town vs.  
Truter.

THE CHIEF JUSTICE, in giving judgment, said he was always unwilling to reverse the decision of a Resident Magistrate when it turned upon a mere question of fact; but while he wished to express an opinion that the decisions of the Resident Magistrate in this city were generally fair and sound, he at the same time thought that in this case he was wrong. It was admitted on all hands that it was a load of oat-sheaves put upon the market without a warranty, and that it was sold for what a purchaser, who had an opportunity of examining it, chose to give for it. There was no declaration that it was of good quality, and therefore it became the duty of any person who wished to purchase it to make the most minute examination. It was not pretended that it was not a load of oat-sheaves, although it was said that it contained a large quantity of wild oats, but that was not sufficient, he thought, to justify the Court in setting aside the contract. It was, indeed, said that some were wild and some rotten; but then there was the market rule, and it was a case of *caveat emptor*; and if a purchaser without examination bought a load of oat-sheaves at a high price, he must abide by his bargain. There could be no doubt that under rule 12 he should have applied to the market-master, who could take cognisance of such a case; but although there appeared to have been some sort of reference to the market-master, there was nothing to show very clearly how that reference was made, and it seemed as if the purchaser altogether refused to receive the load without waiting for the market-master's decision. Then under the 23rd section the purchaser must pay the market-master immediately, and in case of his refusing to do so, the Commissioners had power to recover. Under the circumstances, he was of opinion that although all the oats were not of good quality, that was unnecessary, for they were not sold

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sioners of the  
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as good and proper oats, and the purchaser had no right to complain. But it was said there had been fraud. It was not necessary for him to say what he might have said if fraud had been proved. In this case it was not proved; if it had been, it was very possible that Truter would have had an action against the person who had deceived him; but, so far as the Commissioners were concerned, the load was sold without any warranty, and, although of very inferior quality, he did not think that ought to prevent the Commissioners from recovering. He would add, that if such questions were entitled to be discussed between the Commissioners and purchasers, it would be very difficult for the Commissioners to carry on such extensive transactions as they did.

CLOETE, J., said he was not sorry the case had come before them, for it was not at all clear that persons generally knew how the 12th rule was carried out. It had existed for many years, and he was not aware whether many such cases came before the market-master; but it was for the Court to say what they thought upon it now. In this case a man named Kramer brought a load of oat-sheaves to the market, and they knew that in practice the farmers did not put their worst oats at the top, but rather put their best oats outwards. That was very general, and farmers would say it was almost impossible to do otherwise. They had good and bad sheaves to vend, and they must be got rid of. In order to meet such cases, the market-master had a certain rule given to him. When a vendor came to him and said his articles were A 1, they were sold as good; but when, on the other hand, the vendor abstained from giving such a warranty, it was at once a notice to all parties that the articles were of an inferior description. The rule of *caveat emptor* then applied, and the purchaser must take them for what they were worth. If a case of fraud had been clearly proved, and the load had been so artificially packed as to have the two outer tiers, consisting of good, and the inner ones of totally worthless, oats, then there might have been a case of fraud, on which the purchaser might have had relief; but, in his view, the evidence did not bear out such a supposition, and the judgment must be reversed.

**WATERMEYER, J.**, said there was very great force in what had fallen from both his brother judges, but he could not himself say that the decision of the Resident Magistrate in this case was wrong. It appeared to him that the defence of the defendant in the Court below was fraud, and he thought the Resident Magistrate had found the evidence sufficient to justify that defence. The Magistrate, and he only, had had the opportunity of hearing the witnesses, and of judging who were to be believed and who not believed; and the Magistrate, after hearing the evidence, thought the load of oat-sheaves had been fraudulently packed. He believed what was said by a witness as to Kramer, as to an intended deception with regard to the load of oat-sheaves, and he believed what witnesses said, that it was so packed as to show very good sheaves outside, but to conceal a great quantity of bad ones, so that they could not be seen at all. Believing this evidence, the Resident Magistrate came to the conclusion that there was fraudulent packing, and if he believed so, he was right in his decision. He (Mr. Justice Watermeyer) thought that decision was one of fact, and, that being so, it should be left to the Magistrate. Under the circumstances he thought the judgment ought not to be reversed.

1886.  
Aug. 9.  
—  
The Commissioners of the  
Municipality of  
Cape Town vs.  
Truter.

The decision of the Resident Magistrate was then reversed, but the Court made no order as to costs, THE CHIEF JUSTICE remarking that the appellants were well able to pay.

#### VISSER vs. DU TOIT.

##### *Vendor and Purchaser.—Plan.*

*When a description of an estate sold is clear and the plan is wrong, the sale will be governed by the description, and not by the plan.*

Action to recover a portion of land alleged by the plaintiff to have been sold to him by the defendant.

The material fact in the case was that the farm in question was sold as embracing all the land between certain streams.

1886.  
Aug. 16.  
—  
Visser vs. Du  
Toit.

1866.  
Aug. 16.  
Vilmer vs. Du  
Toit.

When transfer was delivered to the plaintiff, it was found that the farm did not include all the land shown on the diagram, the dividing line in which had not been made with accuracy. The plaintiff, before bringing this action, had accepted transfer of the estate actually sold by description.

*Porter* was for the plaintiff.

*De Villiers*, for the defendant.

THE COURT held, firstly, that the plaintiff, by accepting transfer upon a diagram which he knew to be imperfect, had waived any right which he might have to claim more from the defendant; (a) and, secondly, they held that when a description was clear, and a plan obviously wrong, the purchaser would take his title according to the land identified by description, and not by the plan.

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*In re BURGER, Deceased.*

*Executor dative.—Appointment.*

*An executor dative, appointed otherwise than by the relatives and creditors of the deceased, was removed by the Court.*

1866.  
Aug. 21.  
*In re*  
*Burger*  
(Deceased).

Motion to set aside the appointment of the executor dative to the estate of J. S. Burger, deceased. On the day appointed by the Master's edict for the election of an executor dative, no relative or creditor of the deceased was present, and no election took place. Subsequently, on the Magistrate's recommendation, the Master appointed Mr. Fryer. The widow and other relatives of the deceased objected to him, and consequently brought this motion.

*Porter*, for the motion, argued that an executor dative

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(a) The judgment and facts of this case on the first point are very obscure; the dictum contained in the second point is the important part of the case.

could only be appointed by a meeting of relatives and creditors, and that no appointment having taken place on the day originally fixed for the purpose, the Master ought to have fixed another day.

*De Villiers*, for Fryer.

THE COURT quashed the appointment of Fryer, and ordered another meeting to be held for the selection of an executor dative; they also made an order that a sale advertised by Fryer should not take place.

1866.  
Aug. 21.  
—  
In re  
Burger.  
(Deceased).

*BADENHORST, Appellant, vs. ALBERTYN, Respondent.*

*Civil Imprisonment.—Costs.—Act No. 20, 1856, Sect. 19.*

*An action having been withdrawn by a plaintiff in the Court of a Resident Magistrate at the suggestion of the latter, as there was no cause of action, the defendant, on this suggestion, agreed to pay the costs. Not doing so, on account of having no means, the plaintiff applied for a decree of civil imprisonment, which was granted by the Magistrate. On appeal to the Supreme Court: Held,—That the Magistrate should not have granted the decree, and that the appeal must be allowed.*

Appeal against a decree of the Resident Magistrate of Caledon by the defendant, whereby the Magistrate granted a decree of civil imprisonment against him.

It appeared that Albertyn had prosecuted Badenhorst before the Resident Magistrate for an assault, and that he had been fined £10, which was paid. Albertyn subsequently began a civil action for the same assault against Badenhorst, which came on for hearing before the Resident Magistrate. The Magistrate stated, when the case came before him, that the action would not lie as there had been a criminal prosecution, and told Albertyn's agent to withdraw the case as there was no cause of action. The dictum of the Magistrate was entered on the record, which was also

1866.  
Aug. 21.  
—  
Badenhorst  
(Appellant) vs.  
Albertyn  
(Respondent).

1866.  
Aug. 21.

Badenhorst  
(Appellant) vs.  
Albertyn  
(Respondent).

marked "Withdrawn." There was conflicting evidence as to whether the Magistrate asked Badenhorst (who appeared in person) whether he would pay the costs, and recommended him to do so, on which Badenhorst promised that he would do so. Other persons said the promise as to costs was an arrangement between plaintiff and defendant, without the intervention of the Magistrate. Afterwards, Albertyn issued a summons against Badenhorst for his costs, and the Magistrate gave judgment on it. Execution was issued on it, and as Badenhorst's property did not realise the amount, the Magistrate, on a summons for a decree of civil imprisonment to which Badenhorst did not appear, granted the decree. Against this decree the defendant appealed.

*Porter*, for the appellant, argued that as by sec. 19 of Act No. 20, 1856, the Magistrate had discretionary powers as to granting a decree of civil imprisonment, this was a case in which he should have refused to issue a decree.

*The Attorney-General*, for the respondent, argued that the original case before the Magistrate had been, in fact, withdrawn; and, therefore, the Magistrate was bound to give the plaintiff the benefit of the law to carry out a private arrangement. He also argued that the Court should not look to the original facts, but merely see that the decree of civil imprisonment was applied for with proper formalities.

THE CHIEF JUSTICE said:—If an appeal had been entered against the judgment of the Magistrate for the costs in the civil process, he would have no hesitation in holding that the decision was wrong. The Magistrate ought not to have allowed the claim for costs under the circumstances stated upon his own record. He was satisfied to consider the law to be as the Magistrate laid it down, namely, that Dr. Albertyn could not maintain an action after having proceeded criminally. With his knowledge of the law, the Magistrate, so far from advising Badenhorst to pay the costs, ought to have advised him not to pay them. He should have been the protector of the ignorant; and, being perfectly cognisant that the man ought not to pay the costs, he ought to have dismissed the claim for them when it was brought

before him. The alleged promise to pay the costs having been made under the circumstances which had been described, the Magistrate should certainly not have given the judgment out of which the subsequent proceedings for civil imprisonment arose. Now that an appeal had been lodged in regular course against the decree of civil imprisonment, the Court would be quite justified in setting that decree aside, for, under the circumstances, the Magistrate ought not to have issued the decree.

1886.  
Aug. 21.  
Badenhorst  
(Appellant) vs.  
Albertyn  
(Respondent).

CLOETE, J., concurred.

WATERMEYER, J., thought it unnecessary to go into the conflicting evidence ; but, taking the record alone, the Magistrate, believing that Dr. Albertyn had no right of action, should have dismissed the case. That being so, no agreement as to costs would be binding on the defendant, who, if judgment had been agreed to, would clearly have been entitled to his costs. It was equally clear, therefore, that, under the circumstances, the Magistrate should not have granted a decree of civil imprisonment, even though the defendant did not appear to oppose it, as the Magistrate was aware of the facts of the case. He agreed in considering that the appeal should be allowed with costs.

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CAMPBELL vs. THE LONDON AND SOUTH AFRICAN BANK.

*Banker.—Liability.—Agent.*

*Bankers undertook to take legal proceedings for a customer against the maker and endorser of a promissory note. For this purpose they instructed A. to take the necessary steps. A. failed to send to his agent the necessary protest and notice, and, consequently, provisional sentence was obtained only against the maker. The customer not having received any sum on the note from the bankers, commenced an action against them for the amount thereof.*



*Held by the Supreme Court,—That the bankers were liable for the negligence of their agent, even though the duty which they had undertaken was outside their business as bankers.*

1866.  
Aug. 22, 25.  
Sept. 11.

Campbell vs.  
The London  
and South  
African Bank.

Action by the payee of a promissory note against the defendants to recover damages for a breach of duty.

The facts of the case appear from the judgment of the Court.

*The Attorney-General* was for the plaintiff.  
*Porter* was for the defendants.

*Cur. adv. vult.*

Sept. 11.

THE CHIEF JUSTICE:—The declaration states that the defendants carried on business as bankers in this Colony, having a branch at Graham's Town, and that the plaintiff employed them as his bankers there, and kept an account with them. That in June, 1864, the plaintiff endorsed in blank and delivered for collection to the defendants a promissory note bearing date the 18th March, 1864, made for £215, by one Brown, payable on the 30th June, 1864, in favour of the plaintiff or his order, and endorsed in blank by one Stone; the proceeds thereof, when collected, were to be placed to the credit of the plaintiff's banking account with the defendants. It is then averred that it became the duty of the defendants, as such bankers, to present the said note for payment, at maturity, to the endorser; and, if it shall be dishonoured at maturity, to serve notice of such dishonour upon the said Stone, as endorser within due time, and to cause the same to be protested; or otherwise to obtain payment thereof, and to pay to the plaintiff, or to enter to his credit in account, the proceeds of the sale; and further, that it became and was the duty of the defendants, as such bankers, upon non-payment of the note in due time, after receiving instruction to that end, that defendants should, on a sufficient tender of indemnity made to them by the plaintiff, and at his costs, take and duly prosecute to judgment proceedings at law against the maker, and against Stone, as

endorser, or otherwise return to the plaintiff the said note in order that he might himself take such proceedings as he might be advised. That the note was dishonoured by the maker at maturity, and that the defendants neglected to give notice of the dishonour to Stone, as endorser, and to cause the note to be duly protested, or otherwise to obtain payment thereof. That plaintiff, on non-payment of the note, in due time gave instructions to the defendants to take and duly prosecute to judgment, proceedings at law against the maker and endorser, and therewith offered a full indemnity against the cost of such proceedings, as far as the same should not be caused by the wilful default or neglect of the defendants; but that the defendants refused to prosecute to judgment, against the said Stone, any action or proceedings in respect of his endorsement; and that the defendants had not returned the note to the plaintiff to enable him to proceed against Stone with effect, whereby the plaintiff had suffered damage to the amount of the note, with interest; and plaintiff prays a judgment for that sum. The defendants plead: first, the general issue; second, that no notice of dishonour to Stone was necessary under the circumstances mentioned in the declaration, and that plaintiff therefore sustained no damage by reason of such notice not having been given; third, that long before the plaintiff delivered the note to the defendants, they had employed one Arbouin as their notary public, to whom they handed all bills, whether their own or their customers' which required to be presented and noted, and due notice of non-payment given to endorsers. That the said notary was of good fame and reputation, and that defendants were not chargeable with want of proper care and prudence by employing him; that plaintiff well knew that Arbouin was the notary employed by the Bank; that on the day the note fell due, the defendants handed the note to the notary, who informed them he had duly presented and noted the same, and had given due notice to the endorser; and, therefore, if Stone did not receive due notice from the notary whereby he was discharged, the defendants were not liable for such neglect, but that the plaintiff's remedy was against the notary. Fourth plea, that with respect to the offer of an indemnity, the defendants joined

1866.  
Aug. 22, 25.  
Sept. 11.

Campbell vs.  
The London  
and South  
African Bank.

1866.  
Aug. 22, 25.  
Sept. 11.

Campbell vs.  
The London  
and South  
African Bank.

issue, and averred that they had always been ready and willing to return the note to the plaintiff. The replication took issue on these pleas. The plaintiff was a customer of defendants' at Graham's Town. The promissory note was paid by him into the Bank for the purpose of collection; and he also requested the Bank to sue the parties if the note were not paid, which duty they undertook. Arbouin was the notary of the Bank, and of good repute as a man of business. This was known by plaintiff. The Bank handed the note to him on the day it became due, and directed him to sue the parties if not paid. Mr. Anderson, the manager, gave distinct evidence on this point. Arbouin presented the note for payment to the maker; whether he gave notice to Stone is not clearly proved, but he transmitted the note to Cape Town, to his agents there, and requested them to proceed against both parties, the maker and the endorser. The agent writes back: "We have sued on the note to obtain provisional sentence. The notice must be sent." The agent in Cape Town issued the summons in the name of a nominal plaintiff, according to custom, and this they could do because the plaintiff had written his name on the back of the note, both above and below the signature of Stone, the endorser. Arbouin failed to send down the necessary protest and notice, and the agents thereupon made no application for provisional sentence against Stone, but obtained it against Brown, the maker. Execution on the judgment against Brown issued, and a small sum, about £40, was recovered and remitted to Arbouin by the agent. Correspondence then took place between plaintiff and the defendants and Arbouin, and they not being able to come to any arrangement, the plaintiff brought the present action. Are the defendants liable? The plaintiff alleges that through the *laches* and neglect of Arbouin, the notary, he has been prevented from receiving the amount of the note from them. That there has been negligence by Arbouin is clear. Had he sent down the notarial certificate to the agents, as he ought to have done, provisional sentence would without doubt have been obtained against Stone; or, at any rate, the Court would have ordered a principal case. But the Court were never asked for provision; it stood over, and was never

mentioned again. I am satisfied that the Bank undertook, on behalf of their customers, not only the ordinary duty of collecting the note, which would include the notice and protest, but also a duty which did not belong to the Bankers,—namely, the duty of causing the note to be put in suit. Mr. Anderson's evidence is very clear on this point. He says: "Six bills were returned by Arbouin. Those which were not were those of Dr. Campbell, now in question, and the promissory note to Cawood. The reason they were not returned was because I gave notice to Arbouin that these two were to be at once proceeded on for recovery. They are both marked C. T. in my writing, which means that they were to go to Cape Town to be sued upon. From the day the two notes were handed to Arbouin they have not been in my possession again." And again in another place: "I instructed Mr. Arbouin to take proceedings on the day the bill became due, before noting. This is not usual, but it is not the only case in which I have given similar orders. I instructed in this case, as I wished proceedings to be taken as promptly as possible; this is not usual in cases of promissory notes placed with us for collection, but with reference to this particular note, we had orders to do so from Dr. Campbell. I promised him I would do so." Thus far the case is clear. It is also clear that the plaintiff has not had any part of the proceeds of the suit against Brown, nor do I find any evidence that he prevented the action against both from being proceeded with. On the contrary, he offered an indemnity in terms which, under the circumstances, was a proper form of indemnity. The fault lies with Arbouin, who was first the notary of the Bank, and, secondly, he was the agent of the Bank as an attorney to put the note in suit. Who is to suffer, the plaintiff or the defendants? I have come to the conclusion that, under the circumstances, the defendants are liable for all the acts of Arbouin, and his neglect or *laches*, or negligence, or something worse than either of these, having stopped the progress of the suit against Stone, the plaintiff ought to have the relief he seeks by this action. Several cases were referred to for the purpose of showing that there was no privity of contract between the plaintiff and Arbouin. A

1866.  
Aug. 22, 28.  
Sept. 11.  
Campbell vs.  
The London  
and South  
African Bank.

1866.  
Aug. 22, 25.  
Sept. 11.  
Campbell vs.  
The London  
and South  
African Bank.

case in the House of Lords, not cited at the Bar, has also a direct bearing on this important question (I refer to *Mackery vs. Ramsays*) (a). Here the defendants undertook to collect the note, and for that purpose a notary was necessary, and the notary was their servant, and the second plea is no answer to the plaintiff's claim. The defendants also undertook to put the note in suit, as proved by Anderson. They, and not the plaintiff, employed Arbouin as the attorney, and Arbouin is liable for his negligence,—not to the plaintiff, with whom he had no privity, but to the defendants.

One further remark, it is said that, under the circumstances, Stone is not entitled to notice of dishonour by the maker because he is only a surety. If this be so, the defendants will yet be able to recover against Stone, even if Arbouin be unable to prove that he gave due notice to Stone that the note had been dishonoured. We offer no opinion on this point, because it might prejudice the case if the defendants, who are now holders of the note, should take proceedings against Stone. Arbouin's evidence is contradictory and unsatisfactory. At all events, the defendants will be able to avail themselves of any action for negligence against Arbouin which they may be able to maintain, and they will also be entitled to sue Stone if they should be advised to do so.

The other Judges concurred.

Judgment accordingly for the plaintiff for £215, with interest and costs.

## THE STANDARD BANK *vs.* RUSSOUW.

### *Foreign Corporation.—Party.*

*In an application by the Standard Bank for provisional judgment on a promissory note, THE COURT held,—That the application should have been made by the manager.*

1866.  
Aug. 26.  
The Standard  
Bank *vs.*  
Russouw.

Application for provisional judgment against one Russouw. The applicant was the Standard Bank, which sued

(a) 9 Clerk and Finelly, 818.

as an incorporated company. The Standard Bank held a promissory note, in respect of which the application was made.

1864.  
Aug. 26.  
The Standard  
Bank vs.  
Rumouw.

*Cole*, for the Bank.

THE COURT took the objection that the Bank was an English and not a Colonial corporation, and ultimately only granted the application on the name of G. M. More, manager of the Bank, being substituted in the summons for that of the Bank itself.

KLOPPER, *Appellant*, vs. NAUDE, *Respondent*.

*Resident Magistrate.—Jurisdiction.—Title to Water.*

*A Resident Magistrate has not jurisdiction to hear a case involving the title to water rights.*

3 h. 55 564

Appeal from a decision of the Resident Magistrate of Worcester, who had given his decision in favour of the plaintiff in the Court below, in an action involving questions of title to certain water rights.

1866.  
Sept. 13.  
Klopper  
*Appellant* vs.  
Naudé  
(*Respondent*).

*Porter*, for the appellant, argued that neither by Act No. 5, 1848, nor by Act No. 20, 1856, had the Magistrate jurisdiction to entertain this action.

THE COURT held that the Resident Magistrate had not jurisdiction to entertain this action, and allowed the appeal with costs.

## PRINGLE vs. PRINGLE.

*Executor.—Payment of Costs.*

*A defendant-executor of an estate was ordered to pay the costs of an action de bonis propriis, as he had been the cause of an expensive and unnecessary litigation.*

1866.  
Nov. 13.  
Pringle vs.  
Pringle.

Motion by the plaintiff for an order that the defendant should pay the costs of an action in which judgment had been given against him as executor of I. Pringle, deceased. Execution had been issued, and a return of *nulla bonâ* had been made as to the assets of the estate, and it was now sought to obtain an order on the defendant in his individual capacity.

*Porter* appeared for the plaintiff.

*The Attorney-General*, for the defendant.

THE CHIEF JUSTICE said that, having regard to the facts of the case, he thought the defendant should pay the costs of the action *de bonis propriis*.

CLOETE, J., said that, with regard to the general law, executors and agents could not be liable for costs except through their conduct in the case they made themselves personally liable, or unless they so conducted themselves in the case as to induce the Court to mark its sense of their conduct by condemning them in costs. As an instance of this principle, he might refer to the case of *Myburgh vs. The Commissioner for the Sequestrator (a)*. The Court, therefore, had always,—when convinced that the action was carried on for their own benefit by executors or agents, or when they only made use of the names of others for their own ends,—mulcted them in costs. With regard to the present case, the Court was well satisfied that the whole action originated out of the act of the defendant himself: for he seized the property, advertised it for sale, and when interdicted by the Court, instead of coming to the Court in proper form, was the cause of very expensive and unnecessary litigation.

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(a) 1 Menzies, 346.5

ALPORT *vs.* KLUVER AND ANOTHER.*Provisional Sentence.—Note.—Agreement.*

*When the holder of a note entered into an agreement to accept a settlement of his claim, and then, for good reasons, withdrew from the agreement: Held,—That this was not a case for granting provisional sentence.*

Motion for provisional judgment for £133 on a promissory note for £250, made by the Kluvers, father and son. The defendants contended that a settlement of the plaintiff's claim had been made by giving up to him certain land, goods, and notes. On the other hand, the plaintiff stated that he had agreed to settle on the terms mentioned, believing that the defendants were giving all this property up to him, but before the transaction was concluded he found this was not the case, and that the defendants had made fraudulent representations to him, and he had then withdrawn from his offer.

1866.  
Nov. 24.  
—  
Alport *vs.*  
Kliver and  
another.

*Cole*, for the plaintiff.

*Porter*, for the defendants.

THE COURT held that on the plaintiff's own evidence it was clear that the liquidity of the note had been destroyed, and, therefore, they refused to grant provisional sentence.

REGINA *vs.* GYSMAN.*Intent to do grievous bodily harm.—Confession.*

*A confession by a prisoner that he had shot a man is not sufficient evidence to warrant a conviction by a Resident Magistrate on a charge of assault with intent to kill or do grievous bodily harm, but is a case to go before a jury.*

THE CHIEF JUSTICE said:—As to this case, in which the Resident Magistrate had sentenced the prisoner to six months' imprisonment on a charge of assault with intent

1866.  
Dec. 6.  
—  
Reg. *vs.*  
Gysman.



1868.  
Dec. 6.  
Reg. vs.  
Gyaman

to kill or do grievous bodily harm, on his own confession, the Court were of opinion the prisoner should be discharged, and the case, if necessary, submitted to a jury. It appeared that the prisoner had been called on by his master, in the middle of the night, to pursue a thief who had been stealing sheep, and, with others who were also armed, he came to the place where the sheep had been slaughtered. Being moon-light, they could trace the thieves' footsteps, and came on a man going off with a portion of the stolen property. He fled, and, seeing that he was likely to escape, the prisoner called on him to stop or he would shoot him; not obeying, he was shot by the prisoner. When called on, the prisoner had confessed to this. But the Court were of opinion that this had not amounted to a confession sufficient to warrant a conviction on a charge of felonious intent, but that the point should have been submitted to a jury.

*In re* KLINCK, *ex parte* DE KORTE.

*Insolvent Ordinance, Act No. 6, 1843, sec. 98.—Sale by Auction.*

*A sale by auction is imperative under sec. 98 of the Insolvent Ordinance, 1843.*

1868.  
Dec. 20.  
*In re* Klinck,  
*Ex parte* De  
Korte.

Motion by one De Korte, a preferent creditor on the estates of S. Klinck and P. C. Klinck, for an order that the trustees should transfer certain landed property belonging to these estates, to H. T. Vigne for the sum of £1000. The applicant was joint mortgagee of these properties. His mortgage amounted to £900, and there was £130 of accrued interest also due. De Vigne had offered £1000 for the property. T. Barry, one of the trustees, and the Swellendam Bank, which was a second mortgagee, with a debt of £270, objected to such sale, and desired the property to be sold by public auction.

*Porter* was for the applicant.

*The Attorney-General*, for the respondents.

THE COURT, after hearing lengthy arguments, said that by the Insolvent Ordinance, sec. 98, a sale by auction was imperative, however desirable a sale by private contract might be. If the particulars of sale were likely to be detrimental to Mr. De Korte's interests, they could be brought before the Court under sec. 56. The costs must be paid out of the estate. Motion refused.

1866.  
Dec. 20.  
—  
*In re Klinck,  
Ex parte De  
Korte.*

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ZWART vs. HERMAN.

*Provisional Sentence.—Bond.*

*The Court refused provisional sentence against the surety when the bond stipulated for two sureties and only one had been appointed.*

Motion for provisional sentence against the defendant on a bond for £520 given by one Gilleome and signed also by the defendant. The bond was to secure payment of a balance of purchase money for a farm, and it contained a clause providing for a second surety, and the defendant resisted sentence on the ground that he had signed under the belief that he was to be only a co-surety, whilst the plaintiff's counsel argued that this was a matter for the defendant and the person for whom he was surety and did not affect his relations with the plaintiff, who was satisfied with his security only.

1867. (1)  
March 2.  
—  
*Zwart vs.  
Herman.*

*The Attorney-General appeared for the plaintiff.  
De Villiers, for the defendant.*

THE COURT refused provisional sentence on the ground that the point was one which was sufficiently important to be decided in the principal case.

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(1) The number of cases for 1867 in Mr. Justice Jacob's collection is singularly few, so that those for this year which are contained in this volume can scarcely be considered as the full number of "reportable" decisions delivered by the Supreme Court in 1867.—EDITOR.

THE CAPE DIVISIONAL COUNCIL *vs.* EKSTEEN.*Boundaries.—Hedge.*

*A row of fir-trees, with bush between, falls within the term hedge.* PER THE CHIEF JUSTICE, BELL, J. dubitante.

1867.  
March 5.  
The Cape Divisional Council  
*vs.* Eksteen.

Action for damages. The defendant had cut down certain fir-trees bordering on a public road, and alleged that they were his property, on the ground that attached to the diagrams were *inter alia*, the words as to the boundary "following the shape of the hedge." The plaintiffs urged that these words referred to a quince hedge, whilst the defendant relied on them as referring to the fir-trees between which at the date of the survey there was a good deal of bush. Other questions of evidence also arose, but not of a character to be of general importance.

*Porter* was for the plaintiffs.

*Cole* was for the defendant.

THE CHIEF JUSTICE, after referring to the several points in the case, said :—with regard to the word hedge, upon the use of which the plaintiffs relied so strongly, he thought it was quite as applicable to the fir-trees with the intervening undergrowth or bush, which formerly existed, as to the quince hedge.

BELL, J., said as to the hedge, it seemed almost impossible that a row of fir-trees, forty feet high, could have been intentionally described as a hedge.

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*In re* DE LA CORNILLERE.

*Arrest.—Release.—Insolvent Ordinance Act No. 6, 1843,*  
*sec. 23.*

*A person arrested by creditors was released on giving security not to leave the Colony for six months.*

1867.  
August 31.  
*In re* De la  
Cornillere.

Motion to release one De la Cornillere from custody. The applicant had been arrested on the ground that he was

1867,  
August 31.  
En re De la  
Coralliere.

about to leave the Colony. The grounds for such supposition, as set out in the affidavit of the detaining creditors, were that the applicant had sold his furniture, had clandestinely left Port Elizabeth, and was waiting at Cape Town to leave the Colony. The applicant denied having such intention, stated that his furniture had cost £26 and had been sold for £20, that he was a week in Cape Town before his arrest, and that he had been arrested in an action, but had surrendered his estate, and was therefore entitled to his discharge.

*The Attorney-General*, for the applicant, referred to the affidavit of the creditors as not being sufficient to warrant his detention, and argued that by sec. 23 of the Insolvent Ordinance he was entitled to his discharge.

*Porter*, for the detaining creditors, argued that sec. 23 of the Insolvent Ordinance left the matter in the discretion of the Court, and that here the circumstances were such as to justify the detention of the applicant.

THE COURT made an order that the applicant should be released on giving security in the sum of £40, not to leave the Colony for six months, or until the further order of the Court. The security to be to the satisfaction of the Master in Cape Town, or of the Resident Magistrate at Port Elizabeth.

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REGINA vs. LIEST.

*Post Office.—Ordinance No. 1, 1846, sec. 37.—Alternative indictment.*

*A prisoner was indicted in the first two counts for an offence against Ordinance No. 1, 1846, s. 37 (a), in the third,*

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(a) Sec. 37 :—"And be it enacted that every person employed by, or under the Postmaster General, who shall contrary to his duty, open, or procure, or suffer to be opened, a post letter, or shall wilfully detain, or delay, or procure, or suffer to be detained or delayed, a post letter, shall be guilty of the crime of contravening this section of the present ordinance, and, when convicted thereof, shall suffer such punishment by fine, not exceeding fifty pounds, or imprisonment, not exceeding one year, or by both, as to the Court seem meet. . . . provided also, that nothing herein contained

*in the alternative, for stealing the letters mentioned in the first two counts. The jury found him guilty generally, and he was sentenced to four years' imprisonment. Held,—That the conviction must be quashed, for from the punishment inflicted the jury must be taken to have found the prisoner guilty on the third count, and the offence in it had not been sufficiently stated. Semble, that the indictment should not have been drawn alternatively and the verdict should not have been general.*

1867.  
Sept. 19.  
Reg. vs. Liest.

Case reserved by FITZPATRICK, J., from the Uitenhage Circuit Court. The prisoner was deputy postmaster at Jansenville, and the indictment charged him in the first count with wrongfully and unlawfully opening a certain letter; the second count was to the same effect, but in respect of a different letter, the third count was in the alternative, beginning with the words, "or otherwise," and charged the prisoner that he stole the said letters. The first two counts were framed as charging offences against Ordinance No. 1 of 1846, sec. 37.—The jury found the prisoner guilty, not stating whether they found him so in respect of all or any of the counts of the indictment. The prisoner was sentenced to four years' imprisonment, subject to the opinion of the Supreme Court, as to whether the prisoner could be found guilty on all counts together.

*Cole* was for the prisoner.

*The Attorney-General*, for the Crown.

THE CHIEF JUSTICE, said that, looking at sec. 37 of the Post Office Act of 1846, on which the two first counts were clearly framed, he observed that in the proviso there was something to this effect, that nothing in the clause should be construed so as to prevent a person from being tried or punished for any offence which they might commit after opening and delaying a letter; so that as the Attorney-General had contended that there was one offence, the opening

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shall be construed so as to prevent any such person, as aforesaid, from being tried and punished for any other or greater crime or offence which he shall commit in regard to any letter, or the contents thereof, before, or at, or after the opening, detention, or delaying of the same."

of the letter, that was a separate and dishonest offence, and there would be no objection to following out the proviso in indicting the person also for stealing the same letter which he had opened, and in that case he would be convicted for two separate and distinct offences. But then this indictment was framed in the alternative, and not as containing three distinct charges; there were two charges for opening a letter and one for stealing, and this made it quite inconsistent with the propriety of taking a verdict on the three counts, as had been done. The indictment might have been framed for the separate offences, but it was put in the alternative, and here they were in a great difficulty in knowing whether the attention of the jury was really called to the third count or not. They could only support the punishment inflicted, by supposing that the verdict was a verdict of guilty on the third count, for on the other two counts the Judge could not have inflicted more than one year's imprisonment.

They must take it for granted that the count which began with the words, "or otherwise," was a separate and distinct charge from the two which preceded it, and then they were asked to support that, as a specific allegation, that the man was guilty of theft. And when they looked into the way in which the charge was laid, he could not help thinking that there was a defect in this count, because, although the time and place were given, it did not appear to him sufficiently to state as a separate and distinct fact that these letters were the property of any person whatever. It was not necessarily clear that the letters were the property of the person mentioned in the first count; he did not think the allegation would be sufficient to support a count of that sort, this being a question which arose on an arrest of judgment, on these grounds, he thought they could not support the conviction, and that it ought to be quashed.

BELL and CONNOR, JJ., concurred, holding that the Judge should have taken a special verdict.

1867.  
Sept. 19.  
Reg. v. Liest.

SKEAD *vs.* BAWDEN AND ANOTHER.

*Wreck.—Removal.—Ordinance No. 1, 1847, sec. 1.*

*There is no power under Ordinance No. 1, 1847, to compel a person to whom a wreck in Algoa Bay may belong to remove it.*

1867.  
Oct. 16.  
—  
Skead *vs.*  
Bawden and  
another.

Motion on behalf of F. Skead, harbour-master of Algoa Bay, for an order to compel the defendants to remove from the harbour the wreck of the barque *Balaklava*. This vessel was sunk in a depth of six fathoms at low water, so as to be dangerous to the shipping, and notice was given to the defendants to remove the wreck within four months, as provided by Ordinance No. 1, 1847, as they had purchased the *Balaklava* and her cargo. Nothing has been done towards removing it, except an attempt to blow it up, which had rendered its ultimate removal more difficult. The four months allowed by the ordinance had now elapsed.

*The Attorney-General*, for this motion, argued that as it was the intention of the Ordinance that the harbour should be kept clear, the Court could grant the required order.

[BELL, J.:—I see no occasion to come before the Court; according to sec. 2, the wreck is forfeited to the Crown, and the Crown can raise it and charge the expense to the parties.]

*The Attorney-General.* The Crown is willing to waive the forfeiture.

[BELL, J.:—The Crown must raise the vessel and proceed for the expenses, that is the meaning of the Ordinance.]

In the result, the Court refused to make the order.

WEST AND ANOTHER, *vs.* CARPENTER.

*Will.—Proclamation of August 22, 1822.—Domicile.*

*A testator having real property in the Colony left it by will to a person with whom he cohabited. At the time of his*

*death, in 1864, the testator was in England. He came to the Colony in 1846; in 1852 he left it and went to England for a short time, having disposed of his property at the Cape; he returned in 1853, left again in 1854, and went through the ceremony of marriage with M. at Melbourne (he being already married), in 1855. He returned in 1857 to set up in business in Port Elizabeth, and in 1863 made his will and returned to England. Held, that the testator could leave his property as he had done, the case being governed by the Proclamation of 1822.*

Action to set aside a will as being null and void, so far as such will affected property in the Colony.

The plaintiffs were G. and G. T. West, and the nominal defendant was F. H. Carpenter executor-testamentary of John West, deceased.

The testator was born in England and married in London in 1826, to one H. Hunt; of this marriage there were issue the plaintiff, and another son, and a daughter since deceased. H. Hunt died in 1833, and in 1835 the testator married his deceased wife's sister. In 1846 the testator came to the Colony with his second wife and two sons by his first wife, a deed of separation was subsequently drawn up. In 1852 the testator left the Colony and returned to England for a short time, having disposed of his property at Cape Town, and in 1853 returned with one H. M. Miles, who was living with him as his wife. In 1854 they went to Australia, and he left behind an authority to dispose of his property in the Colony. In 1855 the testator and Miles went through the form of marriage at Melbourne, returned to England and then to the Colony. In 1863 he made his will, in March of that year he returned to England with Miles and died in 1864, being still possessed of certain real property at Port Elizabeth. By his will he left the whole of his property, excepting some trifling legacies, to his "present wife."

*Cole*, for the plaintiff, argued that the disposition of real property was governed by the *lex loci* and consequently that the plaintiffs were entitled to a proper share in the testator's real property in the Cape.

*Porter*, for the defendant, argued that the will of the

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testator as to real property in the Colony was governed by the Proclamation of August 22, 1822 (a), and that the will was valid.

*Cole*, in reply, argued that the testator had given up residence in the Colony, so as to take him out of the operation of the Proclamation.

THE CHIEF JUSTICE said:—I think judgment should be for the defendant. We have to consider a remedial law which we find in a Proclamation of 1822. We are well aware of the reasons for that law: a number of British-born subjects had arrived in this Colony, and had settled in a particular part of it, and they became discontented because they could not by will dispose of their property as if they had still been in England. The result was that this Proclamation was issued. I think we should endeavour to carry out the spirit of this document, and in so doing, we must see what was the object of the Home Government, in causing this Proclamation to be issued. It seems to me that the intention was, that all persons who were then in the Colony, or who might hereafter come, being British-born subjects, were, according to the spirit of the document, given to understand that if they acquired property in the Colony, they should enjoy the power of disposing of the property to the same extent, and with the same privileges, as if they were still in the mother country, and were disposing of real or personal property there. Then looking at the words used, it seems to me that they are applicable to persons who might reside in the Colony or settle there, so as to enable them to dispose of property during the time that they are so resident or

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(a) "I do therefore add that it shall be hereafter considered lawful, regular, and of full force for all residents and settlers in this Colony of the Cape of Good Hope, being natural-born subjects of the United Kingdom of Great Britain and Ireland, to enjoy the same rights of devising their property both real and personal, as they would be entitled to exercise under the laws and customs of Great Britain: Provided, however, that in case any such natural-born subject of the United Kingdom of Great Britain and Ireland shall enter into the married state within this settlement (called in the Colonial law terms, ante-nuptial contract), the property in such case, both real and personal, shall be administered and divided according to Colonial law, notwithstanding any subsequent testamentary devise, unless made in conjunction with the wife of the party, according to the Colonial law on this head."

settled in the Colony; and that this is its true meaning seems to be clear, because there is a clause in the Proclamation that it applies, "to every natural-born subject who shall be about to enter into matrimonial engagements." From the wording of the clause, I think that the Proclamation was intended to be applicable to all residents and settlers in the Colony. There may be a distinction between the two; but I am unable to perceive it. That being so, how does the case stand? West came to the Colony in 1846, with two sons, for the purpose of carrying on business here. He traded, and remained till 1852, and until that time he was clearly settled and resident in the Colony. He then went to England for a temporary purpose only, and returned to the Colony in 1853. So far he must have been taken to have been a resident and settler within the meaning of the Proclamation, and acquired property which, however, he disposed of soon after, and then he went to Australia. After remaining there for a short time, he went to England, and again came back to the Colony, where he carried on business for seven years at Port Elizabeth, and purchased the real property which is the subject of this action. He then returned to England again, but there is no clear evidence to convince me that he acquired an English domicile, or that he ever gave up all intention of returning to this Colony, and it is quite clear to my mind that so long as he was resident in the Colony, if he acquired property in the Colony, he had the power of disposing of it as if he were in England. But then comes the question whether the words of the Proclamation limit the devising of property whilst in the Colony, or whether the right is only to be enjoyed if the resident or settler continue to remain in the Colony until the time of death? But looking at the spirit in which the Proclamation was issued, I think the intention was to give the colonists to understand that they, being natural-born British subjects, who resided or had settled here, if they acquired property in the Colony, should enjoy the same right of devising it as if they were in England. Now the right of devising takes effect from the death of the party, and that being so, the testator was clearly able to devise the property as he did, and it cannot be set aside. The case

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may be one of hardship for his family, but that must not prevent us from administering the law according to its meaning.

BELL and CONNOR, JJ., concurred.

Judgment for the defendant.

# REGINA vs. HEYNES.

*Game Law.—Proclamation of 21st March, 1822, sec. 14.—  
Resident Magistrate's Jurisdiction.—Appeal.*

*A Resident Magistrate has not jurisdiction to try a case under  
the Game Law Proclamation of March 21st, 1822,  
sec. 14 (a).*

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Appeal against a conviction of the Resident Magistrate of Cape Town, on a charge of contravening the Proclamation of 21st March, 1822, sec. 14.

*Porter* was for the appellant.

*The Attorney-General*, for the Crown.

*The Attorney-General* took the preliminary objection that there was no right of appeal.

*Porter*, for the appellant, argued that there was an appeal if there was jurisdiction in the Magistrate. On the main point he argued that the Magistrate had no jurisdiction, because by sec. 14, of Ordinance of 1822, the penalty was fifty rix-dollars, or six months' imprisonment in default of payment, and the Magistrate, by the Resident Magistrates Court Act, could only imprison for three months, and therefore

(a) Sec. 14:—"That no live game shall at any time, or dead game, between the 1st July and 20th November of each year, both days included, be suffered to pass by, or be carried through the toll or barrier gates, without a special permission from the Governor for the time being, under a penalty of fifty rix-dollars, to be recovered of the person in whose custody or possession such game shall be found, together with all costs and expenses attending the prosecution and conviction, or six months imprisonment in failure of payment thereof."

could not do as he had done, inflict the fine with the alternative of a week's imprisonment.

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*The Attorney-General* in reply.

**THE CHIEF JUSTICE:**—The Attorney-General has not satisfied me that the Resident Magistrate had any jurisdiction whatever to try this case. The 14th section of the Proclamation has never been repealed in any manner by express legislation; and we must therefore see what sort of punishment attaches to the commission of offences against the Proclamation. The section says that all persons bringing game into town, within certain specified periods, shall pay a fine of fifty rix-dollars, together with all costs and expenses of the prosecution, or in default of payment shall be imprisoned for six months. [His lordship read the section.] This is positive legislation, and there is no limit or power given to the Court to cut down the fine or the term of imprisonment in any way. There must be a penalty of fifty rix-dollars, with all costs and expenses; and if they are not paid, then comes the other punishment of six months' imprisonment. Now it seems to me that the Magistrate in this case, even according to the admission of the Attorney-General, had no power to sentence to six months' imprisonment in case of the fine not being paid; and I think that we are not to imagine that, by implication, the appeal which rested in the sitting Commissioner does not apply to this particular case. Nothing has satisfied me that the appeal mentioned in the 15th section, or the necessity of sentencing to six months' imprisonment if the fine be not paid, can be taken away by implication, because the provisions of the Resident Magistrates Act does not give an appeal in cases of this description, and to give such a power to the Resident Magistrate would be to preserve the powers of the Ordinance to the fifty rix-dollars, and take away altogether the power of imprisonment. Taking it all together, I think the proceedings must be set aside.

**BELL, J.:**—If I could find that the Magistrate had jurisdiction then I should be inclined to take it that he might act under the 42nd section of the Magistrates Act in giv-

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ing his judgment; but the penalty imposed by the 14th section of the Ordinance is fifty rix-dollars, without any modification. Now, it is very true that the Magistrate has power to fine to the extent of £5; but not to go so far as to give six months' imprisonment; and if such a case was brought before him, it was a case which he could not deal with; it is a dilemma with one horn only of which he could deal; he could not deal with the other. And it would be very hard for a poor man to be imprisoned for six months if he were charged with such an offence, for want of the money to pay the fine. If the jurisdiction of the Court of Landdrosts and Heemraden had been transferred in so many words, there would be an end to the question. But the Attorney-General has contended that those courts were abolished, and a new jurisdiction created with powers specially limited, at first to the infliction of a fine of £5, or one month's imprisonment, but which have since been increased to £10, and three months' imprisonment, so that there can be no jurisdiction in the Resident Magistrate to try the case according to the 14th section. But if there had been jurisdiction, there must also have been the right of appeal, taking the section as a whole; so that whether on the point of appeal, or the point of jurisdiction, the case must fail.

CONNOR, J.:—The 14th section of the Ordinance must be taken to mean that a person convicted of the offence must have the whole sentence—fifty rix-dollars—with the expense of the proceedings, or six months' imprisonment on failure of payment. Well, it seems to me that it is a most extraordinary proposition that has been put before us, for the Court to hold, that by reason of being quite a distinct tribunal, with a jurisdiction in almost all cases, but with a power of punishment limited to three months' imprisonment, that the imprisonment for six months made imperatively by the Ordinance, can be cut down to three months, to meet the limitation placed on the powers of the Magistrate. Except in cases provided for by some special law, it is clear that the Magistrate cannot sentence to a longer imprisonment than three months. I should have seen some difficulty in this case

if we had to decide one point now. The Attorney-General has said there is no appeal; and it has been said on the other side that if there is no appeal there can be no jurisdiction; but I think the question of no jurisdiction has never been before the Court here or the Court below. But I apprehend there is no jurisdiction.

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REGINA vs. DE KOCK.

*Evidence.—Accomplice.—Ordinance No. 72, 1830, sec. 12.*

*A person having been convicted of theft on the evidence of two accomplices: Held, on appeal, that such conviction must be quashed, as the statute applied to the evidence of two accomplices.*

Appeal from a decision of the Resident Magistrate of Caledon, whereby the appellant was convicted of sheep-stealing. The appellant was a sheep-owner, and two of his shepherds were accused by him of taking, one a sheep, and the other a goat, which belonged to him. One was convicted and the other awaited his trial. Then they gave information that the appellant, on the mountains in 1865, caught two stray sheep and marked them with his own mark, and the witnesses asserted. One Morkel gave evidence that he lost sheep in the mountains in 1865. The Magistrate found the appellant guilty and sentenced him to twelve months' imprisonment.

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*Porter*, for the appellant, argued that the unsupported testimony of two accomplices was not, by Ordinance No. 72, 1830, sec. 12, sufficient to found a conviction.

*The Attorney-General*, for the prosecution, argued that the witnesses were not accomplices in the ordinary acceptation of the term. They were the appellant's servants and were not free agents. The statute did not—he further argued—refer to the evidence of two accomplices.

THE CHIEF JUSTICE said that this was a case of considerable  
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importance. He was of opinion that the unsupported testimony of accomplices should not be taken as proof of the committal of a crime, and the evidence of Morkel could not be considered as any corroboration. Even if the law of the Colony did not support this view he should not have regarded this evidence as sufficient, owing to the long silence kept by the witnesses, and the circumstances under which they gave the information.

BELL, J., was of opinion that by law the evidence of two accomplices might be sufficient to convict a prisoner, though that of one might be insufficient. But in the present case he did not think the evidence in itself sufficient to warrant a conviction.

CONNOR, J., said that in his opinion the Ordinance was meant to apply not merely to cases where only one accomplice gave evidence, but to all cases where the testimony of accomplices in a crime, no matter what their number, was unsupported. These two witnesses were clearly accomplices, and on this ground alone he considered that the conviction should be quashed.

Conviction quashed.











